

No. 90-6616-CFH Title: James R. Stringer, Petitioner
Status: GRANTED v.
CAPITAL CASE Lee Roy Black, Commissioner, Mississippi Department
of Corrections, et al.
Docketed:
December 24, 1990 Court: United States Court of Appeals
for the Fifth Circuit
See also:
90-1164 Counsel for petitioner: Rose, Kenneth
Counsel for respondent: White, Marvin

Entry	Date	Note	Proceedings and Orders
1	Nov 28 1990	G	Application (A90-410) to extend the time to file a petition for a writ of certiorari from December 9, 1990 to February 7, 1991, submitted to Justice Scalia.
2	Nov 30 1990		Application (A90-410) granted by Justice Scalia extending the time to file until December 24, 1990.
3	Dec 10 1990	D	Application (A90-410) to extend further the time to file a petition for a writ of certiorari from December 24, 1990 to January 23, 1991, submitted to Justice Scalia.
4	Dec 11 1990		Application (A90-410) denied by Justice Scalia.
5	Dec 24 1990	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
7	Jan 25 1991		Supplemental brief of petitioner James Stringer filed.
9	Jan 29 1991		Order extending time to file response to petition until February 24, 1991.
10	Feb 27 1991		Order further extending time to file response to petition until March 2, 1991.
11	Mar 4 1991		Order further extending time to file response to petition until March 8, 1991.
12	Mar 8 1991		Brief of respondent Lee Roy Black in opposition filed.
14	Mar 13 1991	X	Reply brief of petitioner James Stringer filed.
13	Mar 14 1991		DISTRIBUTED. March 29, 1991
16	Apr 8 1991		REDISTRIBUTED. April 12, 1991
18	Apr 15 1991		REDISTRIBUTED. April 19, 1991
20	Apr 22 1991		REDISTRIBUTED. April 26, 1991
22	May 6 1991		REDISTRIBUTED. May 9, 1991
24	May 13 1991		Petition GRANTED. limited to Question 3 presented by the petition. *****
26	May 21 1991		Order extending time to file brief of petitioner on the merits until July 18, 1991.
27	Jul 15 1991		Joint appendix filed.
28	Jul 18 1991		Brief of petitioner James Stringer filed.
30	Aug 5 1991		Order extending time to file brief of respondent on the merits until September 20, 1991.
31	Aug 21 1991		Record filed.
		*	USDC SD MS 15 vol. received.
32	Sep 13 1991	G	Application (A91-201) of respondent for extension of time within which to filerespondent's brief on the merits, submitted to Justice Scalia.
33	Sep 17 1991		Application (A91-201) granted by Justice Scalia extending the time to file until October 4, 1991.

No. 90-6616-CFH

Entry	Date	Note	Proceedings and Orders
34	Sep 18 1991		Record filed.
		*	Certified record and briefs - United States Court of Appeals for the Fifth Circuit.
36	Sep 23 1991	G	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
35	Oct 4 1991		Brief of respondent Lee Roy Black filed.
37	Oct 4 1991		Brief amici curiae of Texas, et al. filed.
38	Oct 15 1991		Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED. SET FOR ARGUMENT MONDAY, DECEMBER 9, 1991. (3RD CASE)
39	Oct 15 1991		CIRCULATED.
40	Oct 24 1991		
41	Dec 6 1991	G	Motion of petitioner for appointment of counsel filed.
43	Dec 9 1991		ARGUED.
42	Dec 16 1991		Motion for appointment of counsel GRANTED and it is ordered that Kenneth J. Rose, Esquire, of Durham, North Carolina, is appointed to serve as counsel for the petitioner in this case.

90-6616

NO. 8

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

EDITOR'S NOTE:

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JAMES R. STRINGER,

Petitioner

v.

LEE ROY BLACK, COMMISSIONER
MISSISSIPPI DEPARTMENT OF CORRECTIONS,)

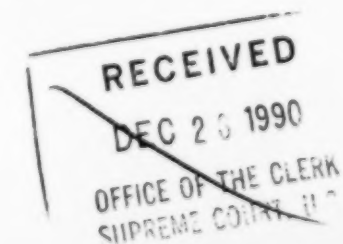
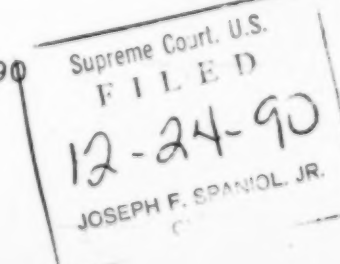
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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December 24, 1990



5104

QUESTIONS PRESENTED

1. Did the court below disregard this Court's remand instruction to reconsider this case in light of Clemons v. Mississippi by applying a state rule of automatic affirmance that this Court found did not clearly exist in Clemons?
2. Can a federal court avoid granting relief from an unconstitutional death sentence by invoking a state "harmless error" rule (1) that was not imposed by the state courts, and (2) that is plainly unconstitutional under Clemons v. Mississippi, and Chapman v. California, 386 U.S. 18 (1967)?
3. Were Clemons v. Mississippi and Maynard v. Cartwright dictated by precedent, such that they cannot be considered "new rules" under Teague v. Lane?
4. Is the requirement of limited sentencing discretion a bedrock procedural element essential to the fairness of a capital sentencing proceeding?
5. Where the State deliberately waives the defense of nonretroactivity in one federal court forum, should it be permitted to raise this defense in the next?

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No.
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

JAMES R. STRINGER

PETITIONER

VS.

LEE ROY BLACK, Commissioner
Mississippi Department of Corrections

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, James R. Stringer, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeal for the Fifth Circuit in Stringer v. Black, 909 F.2d 111 (5th Cir. 1990). Petitioner is currently under sentence of death in the State of Mississippi.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit rendered on July 30, 1990, is reported at Stringer v. Black, 909 F.2d 111 (5th Cir. 1990). A copy of the opinion is attached as Appendix A.

The majority and dissenting opinion of the United States Court of Appeals for the Fifth Circuit rendered in 1988 is officially reported at Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), and is attached as Appendix B.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1), Petitioner, having asserted below, in the Fifth Circuit Court of Appeals, and continuing to assert in this Court the deprivation of rights secured by the United States Constitution, as delineated in the Petition for Writ of Certiorari.

The judgment and opinion of the Fifth Circuit was rendered on July 30, 1990. The Petition for Rehearing was denied by the Fifth Circuit on September 10, 1990. The time for filing a petition for writ of certiorari was extended fifteen (15) days, to and including December 24th, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions:

a. The Eighth Amendment to the United States Constitution, which provides in pertinent part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

b. The Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Prior Proceedings

James Stringer was convicted of capital murder in the Circuit Court of Hinds County and sentenced to death. The Mississippi Supreme Court affirmed on direct appeal, Stringer v. State, 454 So.2d 468 (Miss. 1984), cert. denied, 469 U.S. 1230 (1985) and denied a petition for post-conviction relief, Stringer v. State, 485 So.2d 274 (Miss. 1986). A Petition for Writ of Habeas Corpus filed with the United States District Court for the Southern District of Mississippi was denied. Stringer v. Scroggy, 675 F.Supp. 356 (S.D. Miss. 1987). The United States Court of Appeals for the Fifth Circuit affirmed the district court's decision. Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), reh. denied 866 F.2d 1417 (1989). This Court granted certiorari and vacated the decision below, and remanded the case for further consideration in light of Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441 (1990). Stringer v. Black, ___ U.S. ___, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990). The Fifth Circuit reinstated its previous judgment, again affirming the judgment of the district court. Stringer v. Black, 909 F.2d 111 (5th Cir. 1990). A timely petition for rehearing was denied on September 10, 1990.

B. Statement of the Facts

In the summer of 1982, James Stringer was fifty years old. He had been married to the same wife for 26 years and had four children (T-1131). James had a ninth grade education in Mississippi schools (T-1131-32). At a young age, James volunteered for service in the United States Army during the Korean War. He was decorated for heroism during the war, having served in one of

the most front-line regiments of the Army (T-1132). He reenlisted in the Army, and served his country in that capacity for a total of seven years (T-1132). Upon returning to civilian life, he established himself as a businessman in Jackson, Mississippi, and lived there from 1961 until his arrest in 1982 (T-1132; 1138-39). In his gold and silver business located in downtown Jackson, he had himself been the victim of armed robberies on many occasions (T-1138-39).

In 1979, James Stringer's niece was murdered (T-1135). The effect of this event on James' life was more fully documented in post-conviction proceedings, where several witnesses attested that James was devastated by the murder. He attempted to investigate the murder by himself as a means of coping with this trauma, and during this effort found himself in several fights which resulted in misdemeanor convictions (T-1135). Prior to his capital murder conviction, he had no significant history of prior criminal activity.

At the time of his arrest in 1982, James Stringer was suffering from a combination of hand and back injuries, and his medical bills of at least ten to fifteen thousand dollars placed him under considerable financial duress (T-1141-42).

On June 21, 1982, Mr. and Mrs. McWilliams were discovered in their home, dead of gunshot wounds. Police eventually arrested Mike Meddars and Rhonda Brock, after Meddars had been picked up in another part of the state for assaulting Brock. Meddars admitted his and Brock's involvement in the murders in Jackson, and after

cutting a deal with the police which protected him and Brock from the gas chamber, blamed James Stringer, James' son Jimbo Stringer, and John Mack Parker for actually committing the murders in the course of a robbery attempt.

The State's theory, presented at trial almost exclusively through the testimony of coindictes Brock and Meddars, was that James Stringer planned the crime and led the others in a robbery of Ray McWilliams because Stringer knew McWilliams carried large amounts of cash and dealt in gold and silver at Stringer's exchange. In fact, the plan was worked out by the group; in Meddars' words, the planning was "among talking and one said this and one said this. You know, just talking about it." (T-717). During the planning, the group was drinking heavily and smoking marijuana; James Stringer was the most intoxicated of the group, according to Meddars. (T-729). Meddars drove the group past the house before the robbery to assist the planning. The plan was for Stringer and Brock to go to the McWilliams' home at night and get invited inside on the pretext that Brock needed cash in a hurry and was willing to sell jewelry that she supposedly had. Once they were inside, Ray McWilliams would be forced to tell the robbers where he kept his cash. After the robbery, the plan was to cut the victims' throats so as to avoid gunshots, because they "all knew" that a policeman lived nearby. (T-719). Meddars drove the car used in the crime, and provided the bandanna which was to be used to wipe fingerprints. (T-720).

The plan went badly. According to Brock, Ray McWilliams got

into a struggle with James Stringer. Mack Parker then put a pistol to McWilliams head and said "you are a dead man", pulling the trigger and killing McWilliams with a single gun shot. Mrs. McWilliams came into the kitchen, and Jimbo shot her in the back of the head, killing her instantly. According to witnesses, between the sound of the first shot and the sound of the last, only 8 to 10 seconds elapsed. (T-468). The five hastily left the home without taking anything and drove off in Meddar's car. James Stringer was unaware that Mrs. McWilliams had been killed until the group was back in the car and driving off.

Mississippi's sentencing scheme requires jurors to find that aggravating circumstances are not outweighed by mitigating circumstances before imposing a sentence of death. The jury is required to specify aggravating circumstances, but not mitigating circumstances. James Stringer's jury was instructed that it must unanimously find mitigating circumstances before considering them in the balancing process.

The trial judge permitted the jury, over defense objections, to consider three statutory aggravating circumstances. First, that the Defendant was engaged in an attempt to commit a robbery and the capital murder was committed for pecuniary gain. Second, that the capital murder was committed for the purpose of avoiding or preventing the detection and lawful arrest of the defendant.

Finally, the jury was permitted to consider the aggravating circumstance that the capital murder was "especially heinous, atrocious or cruel". The jury was not given any guidance by the

trial judge as to what that phrase meant.

The prosecutor vigorously argued as the primary justification for imposing the death sentence on James Stringer the fact that the crime was especially heinous, atrocious and cruel. In this regard, the prosecutor showed photographic slides of the crime to the jury describing in detail the facts of the murders and asked the jurors, "Is that atrocious? Is that cruel?" (T-1370-71, 1373-74, 1377-78).

The jury returned a verdict of death after finding each of the three aggravating circumstances.

Mike Meddars, who drove the car, carried a .38 pistol, provided the bandanna and suggested the knife as a means of murdering Mr. and Mrs. McWilliams, got a twenty year sentence for manslaughter for his testimony. Rhonda Brock, who carried a .25 automatic pistol (T-730), who went with James Stringer to the door of the McWilliams' house and tried to trick her way into the house to commit the robbery and murder, also received a twenty year sentence under her plea agreement. John Mack Parker, who shot and killed Ray McWilliams, pled guilty and received a life sentence. Jimbo Stringer, who shot and killed Nell McWilliams with a shotgun, was tried, convicted, and sentenced to life in prison by a jury. He also was tried for his part in the murder of Ray McWilliams, and ended up with a negotiated life sentence in that case. Thus, of the original group accused by Meddars and Brock, James Stringer is the only one on death row.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

James Stringer's capital jury was allowed to consider and rely upon the undefined aggravating circumstance that the capital murder was "especially heinous, atrocious, or cruel." The instruction violated the Eighth Amendment, because it failed to narrowly guide the jury's discretion. See Godfrey v. Georgia, 446 U.S. 420 (1980) and Maynard v. Cartwright, 486 U.S. 356 (1988).

The Mississippi Supreme Court did not find Stringer's instructions to have violated the Eighth Amendment, as interpreted in Godfrey. Stringer v. State, 454 So.2d 468, 479 (Miss. 1984). Finding no error, it performed no harmless error analysis. Nor did it invoke any state procedure that might "cure" such an error. In particular, the state supreme court: (i) never applied any standard of review to determine whether resentencing was required in light of the use of the especially heinous, atrocious or cruel aggravating circumstance; (ii) did not reweigh valid aggravating circumstances against the considerable mitigation set forth above; and (iii) never applied a state "harmless error rule" which automatically affirmed sentences of death where one aggravating circumstance was found to be unconstitutional, but other valid aggravating circumstances remained.

The United States Court of Appeals for the Fifth Circuit found the trial court's instruction regarding the "especially heinous, atrocious, or cruel" aggravating circumstance to be invalid. Stringer v. Jackson, 862 F.2d 1108, 1113 (5th Cir. 1988). The Fifth

Circuit nevertheless applied what it conceived to be a rule in Mississippi allowing "automatic affirmance", and therefore upheld James Stringer's sentence of death. Stringer v. Jackson, 862 F.2d at 1113-1115. According to the Fifth Circuit, Mississippi had a rule that automatically upheld death sentences in the face of an unconstitutional aggravating circumstance as long as at least one valid aggravating circumstance was found by the jury to exist. Id., at 1115. This Court vacated the Fifth Circuit's opinion, remanding the case for further consideration in light of Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441 (1990). Stringer v. Black, ___ U.S. ___, 110 S.Ct. 1800 (1990).

The Fifth Circuit chose not to apply Clemons on remand. Instead, it stood by its earlier decision to affirm James Stringer's sentence, on the theory that Mississippi once had a practice automatically affirming death sentences tainted by an unconstitutional aggravating circumstance. Relying upon Smith v. Black, 904 F.2d 950 (5th Cir. 1990), that Court held Clemons v. Mississippi and Maynard v. Cartwright, 486 U.S. 356 (1988)¹ to be nonretroactive to a petitioner whose conviction was final "prior

¹ The Fifth Circuit panel in Smith v. Black expressly left open the question of whether Cartwright should be retroactively applied to cases in post-conviction proceedings. Smith, 904 F.2d, at 983. Nevertheless, the panel in Stringer mistakenly invoked Smith for the proposition that Clemons and Cartwright should not be retroactively applied. More recently, another panel of the Fifth Circuit relied on Smith only for the proposition that Clemons was nonretroactive, without reaching the question of whether Cartwright was nonretroactive to cases in post-conviction proceedings. Hill v. Black, ___ F.2d ___, No. 87-4922 (5th Cir. December 14, 1990).

to these decisions." Stringer v. Black, 909 F.2d 111 (5th Cir. 1990).

The Fifth Circuit wrongly held Cartwright nonretroactive. Further, on remand from the United States Supreme Court, the Fifth Circuit's options were either to apply a federal harmless error test to the Godfrey error, or to remand the case to the state courts. Instead, the Court erroneously applied an automatic affirmance rule (1) that was never invoked by the state courts in this case, (2) that this Court found in Clemons was not clearly the law in Mississippi, and (3) that is indisputably unconstitutional. Because an automatic affirmance rule was not relied upon by the state courts and was not clearly the law of Mississippi, the Fifth Circuit erred by holding the nonretroactivity of Clemons determinative of James Stringer's claim. As this court discussed in Sawyer v. Smith, 110 S.Ct. 2822, 2832 (1990), the retroactivity of a case need not be considered where the defendant does not rely on the constitutional rule stated in the case. Alternatively, assuming that petitioner must rely upon constitutional doctrine stated Clemons, the court below erred by holding Clemons nonretroactive to James Stringer.²

² The questions presented encompass several alternative grounds for relief. James Stringer need only show that Cartwright should be retroactively applied and (1) the court below failed to follow this Court's direction in Clemons that Mississippi did not clearly have a rule of automatic affirmance; (2) the court below failed to comply with Harris v. Reed, 489 U.S. 255 (1989); (3) the State of Mississippi has waived the defense of the nonretroactivity of Clemons; or (4) the holding in Clemons that a rule of automatic affirmance is unconstitutional should be retroactively applied.

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER
THE COURT BELOW DISREGARDED THIS COURT'S REMAND
INSTRUCTION TO RECONSIDER THIS CASE IN LIGHT OF
CLEMONS V. MISSISSIPPI BY APPLYING A STATE
RULE OF AUTOMATIC AFFIRMANCE THAT THIS COURT
FOUND DID NOT CLEARLY EXIST IN CLEMONS

This Court remanded James Stringer's case for reconsideration in light of Clemons v. Mississippi, 110 S.Ct. 1441 (1990). The court below did not consider the case in light of Clemons. The teachings of Clemons relevant to James Stringer's habeas claims are: (1) the Mississippi Supreme Court did not clearly apply a rule of automatic affirmance to a death sentence tainted by an unconstitutional aggravating circumstance, where other valid aggravating circumstances remained; and (2) if a state court does apply a rule of automatic affirmance, such a rule is unconstitutional. Either of these holdings individually is sufficient to require James Stringer's sentence of death to be vacated.

On remand, the court below did not consider James Stringer's case in light of these teachings in Clemons. Stringer v. Black, 909 F.2d 111 (1990). The Fifth Circuit gave no explanation for not applying the first Clemons holding that Mississippi did not clearly impose an invariable rule of automatic affirmance. Further, that court avoided applying the second Clemons holding by invoking Teague v. Lane, 489 U.S. 288 (1989).

At the time of the decision in Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), rendered prior to Clemons, Mississippi

state law was unclear as to whether a rule of affirmance automatically applied where an invalid aggravating circumstance was relied upon by the jury. See Johnson v. State, 511 So.2d 1333, 1338 (Miss. 1987); see also Stringer v. Jackson, 862 F.2d 1108, 1125-1126 (Johnson, J. dissenting). The state law was sufficiently clouded by the time of the oral argument in Clemons v. Mississippi that the State was able to credibly argue that no rule of automatic affirmance was applied by the Mississippi Supreme Court. Clemons v. Mississippi, No.88-6873, Transcript of Oral Argument at p.22. Rather, the state assistant attorney general maintained that the Mississippi Supreme Court reweighed aggravating and mitigating circumstances on a case-by-case basis.³ The State further insisted that "a proper reweighing of aggravating circumstances was undertaken" in Clemons' case. Clemons v. Mississippi, 110 S.Ct. at 1449. That Mississippi's law was unclear on the effect of an invalid aggravating circumstance on a sentence of death was not surprising; prior to Clemons v. State, 535 So.2d 1354 (Miss. 1988), the Mississippi Supreme Court had never found an aggravating circumstance invalid or unconstitutional.

Clemons v. Mississippi is authority for the proposition that the Mississippi Supreme Court did not have an invariable rule of automatic affirmance. This Court refused to find that Mississippi

³ With no great concern for consistency, the State argued in Clemons that the Mississippi Supreme Court performs a reweighing function. Yet, on remand in Stringer, the State argued that Clemons should not be applied retroactively because it overruled Mississippi's rule of automatic affirmance.

had relied upon an inflexible rule in Clemons. 110 S.Ct. at 1449-1450 ("We find the opinion below unclear with respect to whether the Mississippi Supreme Court did perform a weighing function" and, the Mississippi Supreme Court's opinion "does not necessarily indicate that no reweighing was undertaken"). If Mississippi invariably applied a rule of automatic affirmance, any discussion of appellate reweighing would have been meaningless.

After Clemons, the Fifth Circuit again upheld James Stringer's sentence of death, ignoring this language in Clemons, and holding that decision nonretroactive pursuant to Teague v. Lane. Stringer v. Black, 909 F.2d 111 (5th Cir. 1990). In doing so, the Fifth Circuit implicitly reapplied a state law automatic affirmance "rule".⁴ At the time that court applied the automatic affirmance rule, it did so knowing it was unconstitutional. See Clemons v. Mississippi, 110 S.Ct., at 1450.

What the Fifth Circuit did can't be squared with Clemons, and is hardly reconsideration in light of this Court's teachings in that case. Indeed, the lower court refused to defer to this Court's interpretation of Mississippi law. In Stringer's case, the state court was silent as to whether a rule of automatic affirmance applied. The Fifth Circuit could only find such a rule by looking to other Mississippi cases. This Court found no such clear statement of a rule in Clemons.

⁴ The Fifth Circuit reinstated its previous judgment, Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), which relied upon Mississippi's rule of automatic affirmance to uphold James Stringer's sentence of death. Id., at 1115.

The Court below refused to apply Clemons because it held it nonretroactive under Teague v. Lane, 489 U.S. 288 (1989). However, the controlling holding of Clemons described above involves no statement of constitutional doctrine, much less a "new" statement of constitutional doctrine. What is at issue is the correct interpretation of Mississippi law. Because the Fifth Circuit's interpretation of Mississippi law is inconsistent with this Court's interpretation, it must fall.

Premises considered, this Court should summarily reverse the case in light of Clemons v. Mississippi and allow the Mississippi courts the opportunity to apply a lawful remedy to the constitutional violation.

II.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE
WHETHER A FEDERAL COURT CAN AVOID GRANTING
RELIEF FROM AN UNCONSTITUTIONAL DEATH
SENTENCE BY INVOKING A STATE "HARMLESS ERROR"
RULE (1) THAT WAS NOT IMPOSED BY THE
STATE COURTS, AND (2) THAT IS PLAINLY
UNCONSTITUTIONAL UNDER CLEMONS V. MISSISSIPPI,
AND CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967).

Certiorari should be granted to clarify the proper scope of the "plain statement" rule of Harris v. Reed, 489 U.S. 255 (1989).⁵

⁵ This Court recently granted certiorari to resolve differences among the circuits regarding the proper interpretation and scope of the court's decision in Harris v. Reed, 489 U.S. 255 (1989). Coleman v. Thompson, cert. granted, ___ U.S. ___, No. 89-7662 (October 29, 1990). In Coleman, the Fourth Circuit barred the petitioner's claim based upon an arguably ambiguous one paragraph order of the Virginia Supreme Court denying Coleman relief. The Virginia court dismissed Coleman's post-conviction appeal, but did not state that the dismissal was independently based on a state procedural rule. Unlike Coleman, disposition of this case under Harris is crystal clear. The State does not claim that the state rule, relied upon by the federal courts to deny James Stringer

The Fifth Circuit erred by applying a state harmless error rule, not invoked by the state courts, to a federal constitutional violation. The state law harmless error rule was neither relied upon by the state court, nor based on "adequate" and "independent" state grounds within the meaning of Harris v. Reed, 489 U.S. 255 (1989). Further, the state rule, which permits the automatic affirmance of death sentences by an appellate court without individualized consideration of the effect of the constitutional error on the sentence, is plainly unconstitutional under Clemons v. Mississippi, 110 S.Ct. 1441, 1451 (1990) and Chapman v. California, 386 U.S. 18 (1967).

The court below improperly invoked state law in the absence of a "plain statement" by the state court of an adequate and independent state law basis for its decision. The federal courts must reach the federal question on review unless the state court's opinion contains a "'plain statement' that [its] decision rests upon adequate and independent state grounds.' The Long 'plain statement' rule applies regardless of whether the disputed state-law ground is substantive (as it was in Long) or procedural, as in Caldwell v. Mississippi, 472 U.S. 320, 327 (1985)." Harris v. Reed, 489 U.S. 255, 261 (1989), citing Michigan v. Long, 463 U.S.

relief, was ever invoked by the state courts in his case. For this reason, petitioner is requesting summary reversal in light of Harris v. Reed.

1032, 1042 (1983).⁶ This Court applied the Long doctrine in Harris v. Reed to cases in federal habeas corpus proceedings pursuant to 28 U.S.C. Section 2254.

The court below failed to apply the "plain statement" rule to James Stringer. Following Harris and Long, since the Mississippi Supreme Court did not actually rely upon a state rule of automatic affirmance to deny relief on the basis of the unconstitutional aggravating circumstance, the federal courts should not apply the alleged state rule to bar relief.

Additionally, the state rule was not "adequate" or "independent" under Harris and Long.

In Chapman v. California, this court refused to honor a state harmless error rule applied to a violation of the United States Constitution, which afforded a criminal defendant less protection than a federal harmless error standard. According to Justice Black, "whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." Chapman, 386 U.S., at 21. In Clemons v. Mississippi, this Court noted in passing that Chapman stated the "proper" test for harmless error in this situation.

⁶ This Court applied the Long rule in the context of reviewing a state's harmless error analysis in Delaware v. Van Arsdale, 475 U.S. 673 (1986).

The Fifth Circuit in James Stringer's case flaunted Chapman and Clemons both by applying a state rule contrary to federal law and by not exercising its independent judgment concerning a federal question. That court deferred to Mississippi's uninvoked rule: "We look to Mississippi to decide the impact of the invalid aggravating circumstance on Stringer's death sentence." Stringer v. Jackson, 862 F.2d 1108, 1115 (5th Cir. 1988).

Even assuming that the Fifth Circuit had discretion to invoke a state rule not invoked by the state court, it does not have the discretion to invoke a plainly unconstitutional state rule. A federal court surely cannot in its discretion apply state law, where that law has not been invoked or relied upon by the state court, in a manner which renders it unconstitutional.

Teague v. Lane, 489 U.S. 288 (1989), is meant to validate reasonable interpretations of federal constitutional law made by the state courts. See Butler v. McKellar, 110 S.Ct. 1212, 1217 (1990). The Fifth Circuit has enforced an unconstitutional state harmless error rule, that the state court had not invoked. The only court to rely upon the unconstitutional rule of automatic affirmance was the Fifth Circuit, not the state courts. James Stringer went into the Fifth Circuit with one constitutional error at the sentencing phase of his trial; he came out of the Fifth Circuit with two constitutional errors. Correction of the Fifth Circuit's error regarding the proper application of a harmless error test does not implicate Teague. To the contrary, by reaching out to attribute to the state court an unconstitutional basis for

a decision which was not first invoked by the state court or clearly sanctioned by state law, the court below has positively harmed the interests of comity and federalism.

Without grounding the decision in a "plain statement" of state law by the Mississippi Supreme Court in James Stringer's case, the Fifth Circuit has presumed that the Mississippi courts would follow an unconstitutional course by automatically upholding the death sentence. Needless to say, Federal courts should be especially cautious before ascribing to a state court intentions which are unconstitutional (as this Court was in Clemons). Principles of federalism and comity are offended when, as here, a federal court reads into a state court decision a principle of state law that the state court had not considered or relied upon in the case. See Cabana v. Bullock, 474 U.S. 376, 391 (1986) (the state has "'a weighty interest in having valid constitutional criteria applied in the administration of its criminal law by its own courts.'") That is doubly true when the principle of state law introduced by the federal court is indubitably unconstitutional. Post hoc application of an unconstitutional rule does nothing to advance the interests protected by Teague v. Lane, supra. Further, such a course is prohibited by Michigan v. Long, and Harris v. Reed.

Wherefore, premises considered, this case should be reversed summarily in light of Chapman v. California, Clemons v. Mississippi, and Harris v. Reed, or, in the alternative, certiorari should be granted to consider this question.

III.

THE COURT SHOULD GRANT CERTIORARI
TO RESOLVE THE CONFLICT AMONG
THE LOWER COURTS AS TO WHETHER
CLEMONS AND CARTWRIGHT WERE
DICTATED BY PRECEDENT, SUCH THAT
THEY CANNOT BE CONSIDERED "NEW
RULES" UNDER TEAGUE

The court below held that claims raised under Clemons and Maynard are not available to a habeas petitioner whose conviction was final prior to these decisions, because they constitute a new rule of law under Teague. Stringer v. Black, 909 F.2d 111 (5th Cir. 1990). This decision, along with the Fifth Circuit decision in Smith v. Black, 904 F.2d 950 (5th Cir. 1990), have created a conflict of law among the federal circuits which should be resolved by this court.

A. Maynard v. Cartwright should be applied retroactively

Maynard v. Cartwright, 486 U.S. 356 (1988), held unconstitutional an Oklahoma statute which permitted a criminal defendant to be sentenced to death based upon an aggravating circumstance that the defendant's conduct was "especially heinous, atrocious or cruel." As this noted, Cartwright was a straightforward application of Godfrey v. Georgia, 446 U.S. 420 (1980): "Godfrey controls this case." Cartwright, 486 U.S. at 363 (emphasis added); see also, Lewis v. Jeffers, 110 S.Ct. 3092, 3100 (1990)(In Cartwright, "we applied the teachings of Godfrey.")

Other circuits that have explicitly considered this issue have held Cartwright to be retroactive. Newlon v. Armontrout, 885 F.2d 1328, 1333 (8th Cir. 1989) (Cartwright is dictated by Godfrey and is therefore not a "new rule" for purposes of Teague v. Lane);

Davis v. Maynard, 911 F.2d 415, 418 (10th Cir. 1990) (Godfrey, decided three years before Davis' conviction became final, clearly dictated our holding in Cartwright, and therefore we did not create a new rule under Teague and Penry.)

Godfrey held unconstitutional a death sentence in which the jury found as an aggravating circumstance that the defendant's conduct was "outrageously or wantonly vile, horrible, or inhuman." As the Godfrey Court noted, "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." Godfrey, 446 U.S. at 428-29. Cartwright simply applied the legal rule set forth in Godfrey to the particular statutory language at issue in Cartwright: the words "heinous, atrocious or cruel." Thus in Cartwright, the Court found "the language . . . 'especially heinous, atrocious, or cruel' "-- gave no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language . . . in Godfrey." Cartwright, 486 U.S. at 363-64.

Only the State's statutory language in Cartwright, which provided the factual background for the challenge to the statute, distinguishes Cartwright from Godfrey. The rule in both cases is the same: the Eighth Amendment forbids a state from imposing a sentence of death based upon a standardless death penalty statute. Cartwright is not "new" simply because it applied this rule to the words "heinous, atrocious, or cruel," whereas Godfrey applied the rule to the words "wantonly vile, horrible or inhuman."

This Court first reviewed the "especially heinous, atrocious,

or cruel" aggravating circumstance in Proffitt v. Florida, 428 U.S. 242 (1976). In Proffitt, the court reviewed an argument that this aggravating circumstance was vague and overbroad. 428 U.S. at 255. The Court noted that the Florida Supreme Court had consistently applied a limiting construction so that the statutory provision was "directed only at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.'" Id. (citations omitted). The court concluded that "[w]e cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See Gregg v. Georgia, ante, at 200-203." Id. at 255-256. (emphasis added).

Likewise in Gregg v. Georgia, 428 U.S. 153, 200-203 (1976), this Court upheld the facial validity of the 'outrageously or wantonly vile, horrible or inhuman' language of the Georgia aggravating circumstance. The United States Supreme Court predicated its affirmance of the aggravating circumstance on the premise that the Georgia Supreme Court would not adopt an open-ended construction. Id. at 201. When it became clear that such an openended and overbroad application of the "outrageously or wantonly vile, horrible or inhuman" circumstance was the practice in Georgia, the Court held the circumstance unconstitutional as applied, Godfrey v. Georgia, 446 U.S. 420 (1980).

This Court's decisions in Gregg, Proffitt, and Godfrey, read in conjunction, left no doubt that the "especially heinous, atrocious, or cruel" aggravating circumstance must be construed and

applied narrowly. Furthermore, the Court stated that Godfrey applied to the "especially heinous, atrocious or cruel" aggravating circumstance in Eddings v. Oklahoma, 455 U.S. 104, 109 fn. 4(1982):

We understand the Court of Criminal Appeals to hold that the murder of a police officer in the performance of his duties is "heinous, atrocious, or cruel" under the Oklahoma statute. See Roberts v. Louisiana, 431 U.S. 633, 636, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637 (1977). However, we doubt that the trial judge's understanding and application of this aggravating circumstance conformed to that degree of certainty required by our decision in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

The genesis of the above jurisprudence parallels the jurisprudence described in Penry v. Lynaugh, 109 S.Ct. 2934 (1989). In Penry, this Court applied its decision retroactively notwithstanding the Texas statute was deemed facially valid in Jurek. According to the Court, "the facial validity of the Texas death penalty statute had been upheld in Jurek on the basis of assurances that the special issues would be interpreted broadly enough to enable sentencing juries to consider all of the relevant mitigating evidence a defendant might present." 109 S.Ct. at 2946-47. Penry argued that those "assurances were not fulfilled in his particular case," and the Court concluded "in light of assurances upon which Jurek was based", the relief Penry sought does not impose a new rule on the State of Texas. Id. at 2947 (emphasis in the original).

The decision below is inconsistent with Lewis v. Jeffers, 110 S.Ct. 3092 (1990). Retroactivity is a threshold issue in federal

habeas corpus proceedings. See, e.g., Teague v. Lane, 489 U.S., at 300; Saffle v. Parks, 110 S.Ct. 1257, 1259 (1990). It is significant, therefore, that in Lewis v. Jeffers, 110 S.Ct. 3092 (1990), this Court evaluated the Cartwright challenge to Arizona's "especially heinous" aggravating circumstance without a single reference to retroactivity.

For these reasons, Cartwright is not "new law" for purposes of the doctrine of nonretroactivity and the Teague bar does not apply.

B. Clemons should be applied retroactively

Assuming arguendo, that James Stringer must also rely upon Clemons v. Mississippi,⁷ that case should be retroactively applied.

This Court held in Clemons that,

An automatic rule of affirmance in a weighing State would be invalid under Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances. Cf. Barclay v. Florida, 463 U.S. 939, 958 (1983).

Clemons v. Mississippi, 110 S.Ct. at 1450. The court below found this language to constitute a "new rule" which precludes retroactive application to convictions which were final at the time the rule was announced.

⁷ Since the state appellate court did not rely upon an unconstitutional rule of automatic affirmance, and because this Court held in Clemons that such a rule did not clearly exist in Mississippi, the retroactivity of Clemons v. Mississippi is not at issue, and should therefore not have been held determinative by the court below.

The caveat of Clemons v. Mississippi that the state appellate court in a weighing state cannot cure constitutional error without consideration of both aggravating and mitigating circumstances, is no "new obligation" on the state of Mississippi.

The traditional harmless error rule applicable to federal constitutional error was stated by the United States Supreme Court in Chapman v. California, 386 U.S. 18, 24 (1967). That rule requires the state to prove "beyond a reasonable doubt" that the error was harmless. Clemons v. Mississippi reaffirmed the applicability of this rule to sentencing phase error. In addition, this Court gave state appellate courts the option of "reweighing" valid aggravating and mitigating circumstances. The Chapman test does not permit a reviewing court to do nothing about constitutional error by "automatically affirming" without regard to evidence favorable to the defendant. Clearly, each application of Chapman to a different category of federal error does not create a "new rule" under Teague, yet that is the essence of the Fifth Circuit opinion in this case.

In Barclay v. Florida, 463 U.S. 939 (1983), this Court reviewed an error of state law during the sentencing phase of a capital case in a "weighing jurisdiction" - - i.e., where the capital sentencer weighs aggravating and mitigating circumstances in determining punishment. The Court framed the critical question as "whether the trial judge's consideration of this improper aggravating circumstance so infects the balancing process created by the Florida Statute that it is constitutionally impermissible

for the Florida Supreme Court to let the sentence stand." Id., at 956; see also Wainwright v. Goode, 464 U.S. 78, 86 (1983). The Court relied in part upon the fact that "the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless." 463 U.S. at 958. The Court emphasized the necessity that such an analysis include an "'individualized determination on the basis of the character of the individual and the circumstances of the crime.'" Id., quoting Zant v. Stephens, 462 U.S. 862, 879 (1983)(emphasis added in Barclay). If under Barclay, an automatic affirmance rule does not cure errors of state law in a weighing state, such a rule cannot apply to resolve violations of the federal constitution.

An automatic rule of affirmance disregards all mitigating circumstances. Long ago, in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), this Court set forth as one of the bedrock features of the Eighth Amendment that a capital defendant is entitled to individualized treatment of mitigating circumstances, such that any State rule precluding consideration of individualized mitigation is constitutionally infirm. This "rule" is of sufficient vintage to withstand any attack on its applicability in habeas review of death sentences. See Penry v. Lynaugh, 109 S.Ct. 2934 (1989) (Rule that juries must be given instructions that make it possible for them to give effect to mitigating evidence dictated by Lockett and Eddings). The rule

applied to any sentencer in a capital case, whether it be a judge or a jury. In Clemons, this Court merely applied the Lockett rule to a state appellate court's determination to let stand a death sentence which, at the trial level, was tainted by an unconstitutional aggravating circumstance.

Consequently, the state courts could not reasonably believe that an "automatic affirmance rule" would cure an unconstitutional aggravating circumstance relied upon by the jury in a weighing jurisdiction prior to Clemons v. Mississippi.

IV.

THIS COURT SHOULD GRANT CERTIORARI TO
DETERMINE WHETHER THE REQUIREMENT OF LIMITED
SENTENCING DISCRETION IS A BEDROCK
PROCEDURAL ELEMENT ESSENTIAL TO THE FAIRNESS
OF A CAPITAL SENTENCING PROCEEDING

Certiorari should be granted to resolve a question of extraordinary importance as to what constitutes a bedrock procedural element essential to the fairness of a capital sentencing proceeding. Assuming arguendo that either Cartwright or Clemons is a "new rule" which must be relied upon by James Stringer, the question is presented whether the Eighth Amendment requirement of limited sentencing discretion in capital cases which is protected by these rules is of such importance to the fundamental fairness and accuracy of the sentencing process as to be applicable in habeas review under the second Teague exception. Under this exception, "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" are applied retroactively despite their novelty, see

Saffle v. Parks, 110 S.Ct. 1257, 1263 (1990); Sawyer v. Smith, 110 S.Ct. 2822, 2831 (1990).

According to this Court in Cartwright, Godfrey v. Georgia, 446 U.S. 420 (1980), "which is very relevant here", applied the "central tenet of Eighth Amendment law" stating a "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Cartwright, 486 U.S., at 362 (emphasis added). This theme has been echoed in other recent decisions. In Lewis v. Jeffers, 110 S.Ct. 3092 (1990), this Court stated:

Our capital punishment doctrine is rooted in the principle that "[t]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed." Gregg v. Georgia, 428 U.S. 153, 188 (1976) (joint opinion) [quoting Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring)]; see also Furman, *supra*, at 313 (White, J., concurring) (invalidating capital punishment statute where "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.") Accordingly, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S., at 189.

This principle requires a State to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey, *supra*, 446 U.S., at 428.

Jeffers, 110 S.Ct., at 3099.

In Walton v. Arizona, 110 S.Ct. 3047 (1990), Justice Scalia underlined the centrality of the principle of limited discretion in capital sentencing:

[W]e have routinely read Furman as standing for the proposition that "channeling and limiting . . . the sentencer's discretion in imposing the death penalty" is a "fundamental constitutional requirement," Maynard v. Cartwright, 486 U.S. 356, 362 (1988), and have insisted that States furnish the sentencer with "'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, 446 U.S. at 428.

Walton, 110 S.Ct., at 3060-3061 (Scalia, J., concurring).

Both Cartwright and Clemons protect the "fundamental constitutional requirement" of limited discretion in capital sentencing. Godfrey, Cartwright, and Clemons, enforcing as they do the central principle of Eighth Amendment jurisprudence, announce "watershed rules" of capital procedure which must be applied on habeas review of death sentences. Therefore, even if this Court should find that Cartwright and Clemons announce "new rules," under the second Teague exception, these protections of the fundamental constitutional principle of limited sentencing discretion in capital cases must be given retroactive effect.

V.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE LOWER COURTS AS TO WHETHER THE DEFENSE OF NONRETROACTIVITY IS WAIVED WHERE THE STATE DELIBERATELY DECLINES TO RAISE THE DEFENSE IN ONE FEDERAL COURT FORUM, AND RAISES THE DEFENSE IN THE NEXT.

This Court should grant certiorari to resolve the split among the lower courts as to whether the defense of the nonretroactivity of a "new" law claim is waived where the State deliberately declines to raise the defense in one federal court forum, yet raises it in the next. The Seventh Circuit has held that the defense can be waived, while the Fifth and Sixth Circuits have eschewed waiver. Compare, e.g., Hills v. McMackin, 893 F.2d 810, 813 (6th Cir. 1989) and Smith v. Black, 904 F.2d 950, 981, n.12 (1990) (deciding application of Teague) with Hanrahan v. Greer, 896 F.2d 241, 245 (7th Cir. 1990).

Respondent has waived the defense of the nonretroactivity of Cartwright and Clemons. Respondent did not assert a nonretroactivity defense at any time in the Federal District Court, as a defense to James Stringer's claims stated in his Petition for Writ of Habeas Corpus. Following the United States Supreme Court's decision in Maynard v. Cartwright, the state did not allege nonretroactivity of the decision while James Stringer's appeal was pending in the Fifth Circuit, though that defense was clearly available. Respondent did not assert nonretroactivity as a defense in its response to James Stringer's Petition for Writ of Certiorari.

Finally, the State of Mississippi did not assert a defense of nonretroactivity of Maynard v. Cartwright or Clemons v. Mississippi in supplemental briefing in this Court following the Court's decision in Clemons. Respondent's Supplemental Brief in Opposition

to the Granting of Certiorari at p. 8. As a strategic matter, the State of Mississippi tried in vain to convince this Court that the Mississippi Supreme Court had "perform[ed] a reweighing or harmless error analysis" in James Stringer's case, and "affirm[ed] the sentence in the face of an invalid aggravating circumstance." In stark contrast, the State of Mississippi did at that time assert a defense of nonretroactivity to James Stringer's claim that his sentence of death should be vacated and remanded in light of McKoy v. North Carolina, 110 S.Ct. 1227 (1990). There could hardly be clearer evidence of a calculated and deliberate waiver of a defense.

The State of Mississippi raised a defense of nonretroactivity of Maynard v. Cartwright and Clemons v. Mississippi for the first time after Stringer's case was remanded by this Court to the United States Court of Appeals for further consideration in light of Clemons.

Questions of retroactivity are analogous to questions of federal enforcement of state procedural bar rules. Like Wainwright v. Sykes issues, "the Teague rule is grounded in important considerations of federal-state relations", but is not "jurisdictional". Collins v. Youngblood, ___ U.S. ___, 110 S.Ct. 2715, 2718 (1990). In Collins v. Youngblood, the United States Supreme Court permitted the Attorney General, on behalf of the State of Texas, to waive reliance on retroactivity.

Like questions of state procedural bars, the federal courts have no independent interest in refusing to apply a decision

retroactively other than the state interest in finality of its decisions. Thus if the state determines that its interest in enforcing a constitutional rule retroactively outweighs its interest in finality, the federal courts have no stake in barring that claim.

In Hanrahan v. Greer, 896 F.2d 241 (7th Cir. 1990), the court held that the state had waived any objection to the retroactive application of the rule established in Cruz v. New York, 481 U.S. 186 (1987) - - regarding the use of "interlocking confessions" - - because of its failure to raise the defense in a timely fashion. In briefing the issue in the district court, the state addressed the merits of Cruz's argument, without suggesting that the decision should not be applied to the petitioner's case. The court of appeals thus concluded that, by this failure, the state had "missed the boat." Hanrahan, 896 F.2d at 245; see Moore v. Zant, 885 F.2d 1497, 1524 (11th Cir. 1989)(en banc)(Johnson, J., dissenting) (nonretroactivity is an affirmative defense that is lost if not timely raised). In a related context,⁸ the Fifth Circuit has held that the state had waived the defense of procedural default by failing to assert it earlier. Mayo v. Lynaugh, 893 F.2d 683 (5th Cir. 1990); see also Francis v. Rison, 894 F.2d 353 (9th Cir. 1990); Young v. Lockhart, 892 F.2d 1384 (8th Cir. 1990)(all holding

⁸ The defenses of waiver and nonretroactivity are intended to protect the same interests of comity and federalism. See Teague v. Lane, 109 S.Ct. at 1073; Wainwright v. Sykes, 433 U.S. 72, 78-79 (1977)

that the state had waived the defense of procedural default by failing to assert it in a timely fashion.)

In Granberry v. Greer, 481 U.S. 129 (1987), this Court addressed the question of "[h]ow an appellate court ought to handle a nonexhausted habeas petition when the State has not raised this objection in the district court. . . ." Id. at 131. Rejecting the State's position adopted by the United States Court of Appeals for the Seventh Circuit, that the required exhaustion of state remedies was an inflexible bar to consideration of the merits of the petition by the federal court, the Court condemned the adoption of "a rule that would permit, and might even encourage, the State to seek a favorable ruling on the merits in the district court while holding the exhaustion defense in reserve for use in appeal if necessary." Id. at 132. Hence, this Court has criticized "rules that allow a party to withhold raising a defense until after the 'main event'". Id. at 132.

Assuming the state's nonretroactivity argument is otherwise meritorious, considerable delay has been caused by the state's failure to timely assert that defense. Permitting the state to waive a defense in one forum and assert it subsequently severely burdens the habeas corpus system. Had the State initially raised the nonretroactivity defense in this Court, the Court would have had the opportunity to determine the question prior to granting certiorari and vacating the prior Fifth Circuit decision. Instead, the State's deliberate inaction forces multitudinous litigation. A consistently applied procedural rule which applies to both

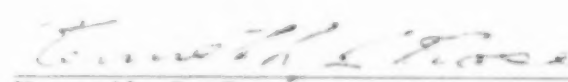
litigants would streamline litigation and enhance the fairness of habeas proceedings.

Premises considered, certiorari should be granted to determine whether the State of Mississippi has waived the defense of nonretroactivity.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,


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language of the hearing panel's decision and found that the panel had used "mandatory, not discretionary language." 365 S.E.2d at 760. Read in the light of the statutory command in § 2.1-114.5:1(D)(4) that the panel's decision be "binding," the court did not hesitate to require implementation of the hearing panel's decision to reinstate the deputy to his former rank.¹³ The *Angle* court did not address the constitutional question that is the single relevant issue in this case. In holding that a sheriff is bound once his deputy proceeds through the grievance process to the "final and binding" step of a hearing panel determination, the court did not rely on any expectation of continued employment that might be sufficient to create a protectible property interest.¹⁴ Rather, the court held that the panel's decision, once rendered, was enforceable against the sheriff. Enforcing the panel's decision in this context did not imply a property interest in continued employment.

IV

[5] Jenkins' federal claim under 42 U.S.C. § 1983 was properly dismissed upon the district court's ruling that he lacked a constitutionally protectible property interest. The court, however, dismissed Jenkins' entire case when it granted the defendants' motion for summary judgment. Their respective summary judgment memoranda filed with the district court, the parties joined issue on the question whether the district court should retain jurisdiction over Jenkins' pending state law claims, but the court did not address that question in either its memorandum opinion or its judgment.

13. In this case, Jenkins was dismissed, not demoted. Given our disposition, we need not determine whether different considerations are relevant when a sheriff dismisses, rather than merely demotes, a deputy.

14. One obvious alternative rationale for the *Angle* court's decision is estoppel. See, e.g., *Employers Commercial Union Ins. Co. v. Great Am. Ins. Co.*, 214 Va. 410, 200 S.E.2d 560 (1973); *Thresher v. Thresher*, 210 Va. 624, 172 S.E.2d 771 (1970); *Cornington Virginian v. Woods*, 182 Va. 538, 29 S.E.2d 406 (1944); cf. *Richard L. Deaf & Assoc. v. Commonwealth*, 224 Va. 618,

ment order. Jenkins' § 1983 claim was substantial enough as pleaded to invoke federal jurisdiction to inquire into its merits. That federal jurisdiction was sufficient to support pendent jurisdiction over Jenkins' state law claims even if his federal claim was, properly, dismissed. See *Ridley v. our v. Andrews Fed. Credit Union*, 897 F.2d 715, 719, 722 (4th Cir.1990); see also 138 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure: Jurisdiction* 2d § 3564 (1994). Because we are unable, in the absence of a ruling from the district court, to effectively review the court's disposition of Jenkins' pendent state claims, we think it appropriate to remand those claims to the district court for the discretionary determination whether the claims should be dismissed without prejudice or retained for decision under pendent jurisdiction. See *UMW v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966); see also *Fisher v. Washington Metro. Area Transit Auth.*, 690 F.2d 1123, 1144 (4th Cir.1982).

V

We affirm the district court's grant of summary judgment in favor of the defendants on Jenkins' § 1983 claim and the subsequent dismissal of that claim. We remand Jenkins' state law claims for the district court to determine whether to dismiss those claims without prejudice or to retain them in the exercise of pendent jurisdiction.

SO ORDERED.



299 S.E.2d 346 (1983) (state not estopped to deny arbitration ruling where state agents had no authority to agree to arbitration of claim).

15. In remanding Jenkins' state law claims, we of course express no opinion on the merits of those claims. We also express no opinion on the issue whether any unusual circumstances exist, such as statute of limitations problems, that might militate in favor of retention of pendent jurisdiction and override the usual approach that where federal claims are dismissed before trial, any pendent state claims should be dismissed as well.

James R. STRINGER,
Petitioner-Appellant,

Charles J. JACKSON, Interim Commissioner, Mississippi Department of Corrections, et al., Respondents-Appellees.

No. 89-4126.

United States Court of Appeals,
Fifth Circuit.
July 30, 1990.

James E. Ostgard, Minneapolis, Minn. (court-appointed), Kenneth J. Rose, Durham, N.C. (court-appointed), Dennis Sweet, Jackson, Miss. (court-appointed), for petitioner-appellant.

Marvin L. White, Jr., Felicia C. Adams, Asst. Attys. Gen., Jackson, Miss., for respondents-appellees.

Appeal from the United States District Court for the Southern District of Mississippi, William Henry Barbour, Jr., Judge.
ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES.
— U.S. —, 110 S.Ct. 1800, 108 L.Ed.2d 931

Before REAVLEY, JOHNSON and DAVIS, Circuit Judges.

REAVLEY, Circuit Judge:

This cause has been remanded to us by the Supreme Court for reconsideration in light of *Clemons v. Mississippi*, 494 U.S. —, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). The problem corresponds to the issue treated in *Maynard v. Carterwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1989). The Attorney General of Mississippi objects to our application of these two cases here on the ground that Stringer's conviction was final prior to either decision, and therefore any claim on that ground is barred by *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). That objection is well taken.

Stringer's conviction was final on February 19, 1985 when the Supreme Court denied his petition for writ of certiorari directed at his conviction and sentence.



UNITED STATES OF America,
Plaintiff-Appellee,

James Othel BORUFF,
Defendant-Appellant.

No. 89-1903

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

July 31, 1990.

Defendant's motion to suppress evidence found after stop of vehicles was granted, but the Court of Appeals reversed, 818 F.2d 863 (unpublished opinion). Defendant's motion to suppress trial testimony of witness who had testified on his behalf at suppression hearing was denied, and the Court of Appeals affirmed, 870 F.2d 316. Defendant was then convicted in the United States District Court for the Western District of Texas, Lucius Desha Burton, III, Chief Judge, of conspiracy to possess and possession of more than 50 kilograms of marijuana with intent to distribute, and he appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) defendant did not have standing to chal-

for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc.

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.



James R. STRINGER,
Petitioner-Appellant,

v.

Charles J. JACKSON, Interim Commissioner, Mississippi Dept. of Corrections, et al., Respondents-Appellees.

No. 88-1126.

United States Court of Appeals,
Fifth Circuit.

Dec. 22, 1988.

Rehearing and Rehearing En Banc
Denied Jan. 20, 1989.

State prisoner under sentence of death sought habeas corpus. The United States District Court for the Southern District of Mississippi, William Henry Barbour, Jr., J., 675 F.Supp. 356, denied relief and prisoner appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) prisoner received effective assistance of counsel; (2) prisoner did not show conflict of interest on the part of trial counsel or appellate counsel representing both himself and his son; (3) trial court's instructions on mitigating circumstances were proper; and (4) death sentence need not be vacated even when one of three statutory mitigating circumstances found by the jury in subsequently held to be invalid and jury has been instructed to weigh the statutory aggravating circumstances against all mitigating circumstances.

Affirmed.

Johnson, Circuit Judge, filed a dissenting opinion.

1. Habeas Corpus ¶45.3(1.40)

Claim of prosecutorial misconduct was procedurally barred from consideration in habeas corpus proceeding where no objections were raised either at trial or on direct appeal.

2. Criminal Law ¶723(1)

Prosecutor's statements during voir dire that there were nine judges sitting on the Supreme Court to whom the prosecutor would have to answer and that the court has to make certain decisions did not mislead the jurors into believing that their decision on defendant's sentence rested with appellate judges rather with them, where the prosecutor's remarks were directed toward an explanation to a juror that the law required that his questions be precise.

3. Criminal Law ¶796

Instruction that jury could return a life sentence if it found no aggravating circumstances or if it failed to find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances and that the jury had to find both that the aggravating circumstances outweighed the mitigating circumstances and that the death penalty should be imposed before imposing the death penalty did not make the death penalty mandatory.

4. Criminal Law ¶822(2)

Although trial court used word "unanimously" when instructing the jury on consideration of mitigating circumstances, the instructions, when taken as a whole, did not lead the jurors to think that they were compelled to ignore mitigating circumstances unless they found them unanimous.

5. Criminal Law ¶796

Trial court's instruction that jurors could consider any and all matters, facts, or circumstances or combination of circumstances surrounding defendant's life, his character, or his record in reaching its decision left the jury free to consider whatever mitigating evidence was raised.

Cite as 862 F.2d 1108 (5th Cir. 1988)

12. Criminal Law ¶641.13(7)

Defendant was not prejudiced by counsel's performance in not presenting mitigating evidence at penalty phase of capital murder trial, despite claim that counsel should have presented evidence of defendant's war record, medical record, and reputation as a businessman and family man, as it was not likely that the evidence would have resulted in a different verdict in view of the state's evidence presented during guilt phase, which the jury obviously believed.

13. Criminal Law ¶641.5

In order to prevail on claim of conflict of interest, defendant must demonstrate that actual conflict existed by pointing to specific instances in the record which reflect that counsel's performance on defendant's behalf was adversely affected by the conflict.

11. Criminal Law ¶641.5

Speculative or merely hypothetical conflicts do not implicate the Sixth Amendment right to the effective assistance of counsel. U.S.C.A. Const.Amend. 6.

15. Criminal Law ¶641.5(3)

Counsel's representation of defendant as well as defendant's son, and son's girl friend who were also defendants, did not establish actual conflict of interest where the defense for all three was alibi and all three told the same story.

16. Criminal Law ¶641.5

Fact that five of the six defense witnesses were represented by the same attorney as defendant, allowing prosecution to refer to those witnesses in closing argument as "Sam's Army," did not show actual conflict of interest where, if all the clients were telling the attorney the truth, as they assured him they were, the defense which he presented was the only one available to any of them.

17. Criminal Law ¶641.13(7)

Counsel was not ineffective for failing to argue at sentencing phase of capital murder trial that it was defendant's son, and not defendant, who was the trigger-man who actually killed the victim as such

6. Criminal Law ¶1177

Reversal of death sentence is not required when one of three statutory aggravating circumstances found by a jury in subsequently held to be invalid and the jury has been instructed to weigh the statutory aggravating circumstances against all mitigating circumstances in determining the appropriate sentence.

7. Homicide ¶308(5), 309(6)

Defendant charged with capital murder was not entitled to instruction on lesser included offense of noncapital murder or manslaughter where, under the evidence presented, defendant either led a gang of robbers with the intent to murder two victims or else was at home nursing a back pain.

8. Criminal Law ¶641.13(1)

In order to show ineffective assistance of counsel, defendant must show both that counsel's performance was deficient and that the deficiency actually prejudiced his defense, thereby making the result of the trial unreliable.

9. Criminal Law ¶641.13(1)

Great deference is given to counsel's performance and it is evaluated in light of the facts and circumstances as they appeared to exist at the time of the trial.

10. Criminal Law ¶641.13(7)

Failure to present a case in mitigation during the sentencing phase of a capital murder trial is not per se ineffective assistance of counsel.

11. Criminal Law ¶641.13(7)

Defendant was not denied effective assistance of counsel by counsel's failure to present mitigating evidence where jury's guilty verdict showed what it thought of defendant's alibi and that they had found him guilty of the deliberate massacre of innocent human beings, so that the testimony of someone who had known and liked defendant years ago was not going to lessen the impact of the evidence, and counsel's only hope was to get at least one juror to have enough misgiving regarding defendant's guilt to block the death penalty.

an argument would not only have undermined any doubt which the jurors had regarding the defendant's guilt, but would also have sent the wrong message to the jury regarding defendant's character and family commitment.

18. Criminal Law ¶641.5

Defendant did not show conflict of interest on the part of appellate counsel representing both himself and his son, despite claim that some arguments made on behalf of defendant's son were not made on behalf of defendant, where those arguments were not available to defendant because of the lack of objection at trial or because of differences in defendant's trial and that of his son.

19. Constitutional Law ¶268(10)

Criminal Law ¶436(4)

Admission of photographs of murder scene did not violate defendant's due process rights. U.S.C.A. Const.Amend. 14.

James E. Ostgard, Minneapolis, Minn. (Court-appointed), Kenneth J. Rose, Dennis Sweet, Jackson, Miss. (Court-appointed), for petitioner-appellant.

Marvin L. White, Jr., Felicia C. Adams, Asst. Attys. Gen., Jackson, Miss., for respondents-appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

Before REAVLEY, JOHNSON and DAVIS, Circuit Judges.

REAVLEY, Circuit Judge:

James R. Stringer seeks the writ of habeas corpus to avoid his sentence of death by the Mississippi courts. We affirm the district court's denial of the writ.

I. Background

On the evening of June 21, 1982, Ray McWilliams and his wife, Nell McWilliams, were murdered in their home in Jackson. The State's case against James Stringer rested upon the testimony of Rhonda Brock and Mike Medders, two of the five alleged

Cite as 862 F.2d 1108 (5th Cir. 1988)

rights. Because each of Stringer's points of error is either procedurally barred or without merit, we affirm the district court's denial of the writ.

II. Prosecutorial Misconduct

(1, 2) Stringer contends that his sentence of death should be overturned because of several alleged instances of prosecutorial misconduct: (1) comments made during voir dire and closing argument; (2) photographs of the McWilliams introduced into evidence; and (3) comments made regarding Stringer's refusal to take a polygraph test. Both the district court and the Mississippi Supreme Court held that this claim was procedurally barred because no objections were raised either at trial or on direct appeal. *Stringer*, 675 F.Supp. at 365; *Stringer*, 485 So.2d at 275. We agree that these complaints are procedurally barred. Moreover, we see no merit there. For example, Stringer complains about a statement the prosecutor made during closing, but the trial court did all that it was requested to do by sustaining the defense counsel's objection. If the introduction of the photographs and comments about them and the polygraph test were improper under any law, there was clearly no prejudice to Stringer's substantial rights. *See Felde v. Blackburn*, 795 F.2d 400, 403 (5th Cir. 1986), *cert. denied*. — U.S. —, 108 S.Ct. 210, 98 L.Ed.2d 161 (1987). As for the contention that the prosecutor misled the jury into believing that the decision on Stringer's sentence rested with appellate judges rather than with them, in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), Stringer points to two statements made during voir dire of prospective jurors: (1) that there are "nine Judges sitting up there on the Supreme Court that I've got to talk

III. Jury Instructions

Stringer asserts several points of error based on the trial court's instructions to the jury.

A. Life Option

Stringer contends that the trial court not only omitted necessary language from the instructions, but also included language "which would have misled the jury about whether mercy could be extended to the appellant." Stringer failed to raise this point before the district court and we need not address it. *See Willie v. Maggio*, 737 F.2d 1372, 1397-88 n. 20 (5th Cir.), *cert. denied*, 469 U.S. 1002, 105 S.Ct. 415, 83 L.Ed.2d 342 (1984). Moreover, the trial court's charge may not be construed as Stringer argues.

(3) The trial court instructed the jury that it could return a life sentence if it found no aggravating circumstances or if it failed to find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances.¹ In order to impose the death penalty, the jury was instructed that it must find both that

outweigh the mitigating circumstances, then your verdict shall be in the following form: "We the Jury, find the defendant should be sentenced to imprisonment for life in the state penitentiary."

If, after reasonable deliberation, you cannot agree as to the punishment, you should certify your disagreement to the Court, and the Court shall, under the law, impose a sentence of imprisonment for life.

the aggravating circumstances outweighed the mitigating circumstances and that the death penalty should be imposed. Furthermore, the jury was told that the defendant would be sentenced to life imprisonment if they could not agree on punishment. These instructions did not make the death penalty mandatory. See *Edwards v. Scroggyn*, 849 F.2d 204, 213 (5th Cir.1988) (citing *Edwards v. Thigpen*, 595 F.Supp. 1271, 1286 (S.D.Miss.1984)).

Stringer next complains that, as in *Mills v. Maryland*, — U.S. —, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), the trial court erred in instructing the jury that it must unanimously find mitigating circumstances before it might weigh them against aggravating circumstances. The result of such an instruction, Stringer alleges, is that the sentencing phase of the trial became subject to the possibility of a completely arbitrary decision to impose death because one juror could prevent all other jurors from considering a particular mitigating circumstance.

In *Mills*, the Supreme Court considered the propriety of a verdict form submitted to a jury in a Maryland state court and concluded that "there is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills*, 108 S.Ct. at 1870. In vacating the judgment which sustained the imposition of the death penalty,

2. The jury was instructed, in pertinent part, as follows:

If you unanimously find from the evidence any one or more of the mitigating circumstances listed above exists, and, if after weighing the mitigating circumstance(s) and the aggravating circumstance(s), one against the other, you further find unanimously from the evidence beyond a reasonable doubt that the aggravating circumstance(s) outweigh the mitigating circumstance(s) and the death penalty should be imposed, your verdict shall be written on a separate sheet of paper, shall be signed by your foreman, and shall be in the following form:

the Court focused on the specific instructions given in that particular case.

(4) Although the trial court undoubtedly added "unanimously" by oversight as the third word in the instructions quoted below,² a reading of the entire charge would not have led the jurors to think they were compelled to ignore mitigating circumstances (unless found unanimously) in determining an appropriate sentence for Stringer. The instructions given did not restrict the jury's right and power to consider the appropriateness of the death penalty even after it found that the aggravating circumstances outweighed the mitigating circumstances.

B. Mitigating Circumstances

(5) Stringer claims that the trial court's instructions improperly restricted the jury's consideration of mitigating circumstances in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The trial court instructed the jury that it could consider as mitigating, among other things, "any and all other matters, facts or circumstances, or combination of circumstances surrounding the defendant's life, character or record or any circumstance(s) of the offense brought before you during the trial of this cause which you, the jury, deem to be mitigating on behalf of the defendant or which reasonably mitigate against imposition of the death penalty." Under this instruction, Stringer's attorney was free to argue and the jury was free to consider whatever mitigating evidence was raised.

"We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstance(s), (list the aggravating circumstance(s), if any, which you unanimously find beyond a reasonable doubt from those listed above in the same language as they are listed.) We, the Jury, further find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstance(s) and the aggravating circumstance(s), one against the other, that the aggravating circumstance(s) do outweigh the mitigating circumstance(s) and that the defendant should suffer the penalty of death." (emphasis added)

received during the trial as well as all facts and circumstances presented in extenuation, mitigation, or aggravation during the sentencing proceeding." *Zant*, 103 S.Ct. at 2737. The jury found three aggravating circumstances beyond a reasonable doubt and sentenced Stephens to death. The Georgia Supreme Court later held one of the statutory aggravating circumstances invalid on the ground that it was constitutionally vague, yet determined that the other two aggravating circumstances adequately supported the death sentence. *Id.* at 2738.

The United States Supreme Court ultimately upheld this decision, rejecting the defendant's contention that Georgia's statutory scheme was invalid under the holding in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). In so doing, the Court emphasized two important features of Georgia's scheme which it determined adequately channelled the finder's discretion in imposing a sentence: first, that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and second, that the state supreme court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate. *Zant*, 103 S.Ct. at 2742. The Court summarized its cases concerning the treatment of statutory aggravating circumstances:

Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.

Zant, 103 S.Ct. at 2743-44 (citations and footnote omitted).

The Mississippi capital sentencing scheme, though similar in many respects to Georgia's scheme, differs in one material aspect. Like Georgia, Mississippi requires the jury to find at least one statutory aggravating circumstance beyond a reasonable doubt in order to consider imposing the death penalty. Like Georgia, Mississippi requires the state supreme court to review each death penalty for arbitrariness and proportionality. Unlike Georgia, however, Mississippi requires that the jury weigh statutory aggravating circumstances against all mitigating circumstances as part of its process in deciding an appropriate sentence. Therefore, in Mississippi, unlike in Georgia, the finding of a statutory aggravating circumstance plays some role in guiding the sentencing body in the exercise of its discretion in addition to its function of narrowing the class of defendants convicted of murder who are eligible for the death penalty. Even if the jury determines that the statutory aggravating circumstances outweigh the mitigating circumstances, however, the jury is always entitled to return a sentence of life imprisonment.

We believe that the Mississippi capital punishment scheme, as applied in this case, passes constitutional muster for virtually the same reasons articulated by the Supreme Court in *Zant*. The jury in this case, like the jury in *Zant*, found the existence of three statutory aggravating circumstances and identified them in writing. On appeal, the Mississippi Supreme Court found that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, that the evidence was sufficient to support the jury's findings on each statutory aggravating circumstance, and that the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. *Stringer*, 454 So.2d at 478-79.

The Supreme Court, in *Maynard*, determined that the "especially heinous, atrocious, or cruel" aggravating circumstance, when submitted for the jury's consideration without a limiting instruction, is constitutionally overbroad. The facts of this

C. Aggravating Circumstances

Relying on *Maynard v. Cartwright*, — U.S. —, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), Stringer asserts that his death sentence should be set aside since the trial court failed to define the unconstitutionally overbroad "especially heinous, atrocious, and cruel" aggravating circumstance. The State maintains that our decision in *Edwards v. Scroggyn*, 849 F.2d 204 (5th Cir. 1988), forecloses Stringer's argument. In *Edwards*, the defendant-appellant argued that there was insufficient evidence to support one of the aggravating circumstances found by the jury and that, therefore, his death sentence should be vacated. This court, assuming for the sake of argument that the aggravating circumstance complained of was invalid, determined that the death sentence should stand. In so holding, the court distinguished the case before it from that presented in *Maynard*.

[*Maynard*] was remanded to the Oklahoma court to determine as a matter of state law whether the sentence should be set aside. Unlike Oklahoma law, however, Mississippi law is clear that one invalid aggravating circumstance will not suffice to overturn a death penalty where other valid aggravating circumstances remain. *Edwards*, 849 F.2d at 211 n. 7 (citations omitted). Actually, the Supreme Court affirmed the Tenth Circuit's judgment which vacated the death sentence and remanded the cause to the state court for such further proceedings as it might wish to conduct.

The facts in *Maynard* are, however, distinguishable from those presented in *Edwards* and those presented here. In *Maynard*, the State advanced the argument that the death sentence should be upheld because there was a valid aggravating circumstance remaining. In rejecting this argument, the Supreme Court noted that at the time that *Cartwright's* case was decided, the Oklahoma Court of Criminal Appeals itself would not attempt to save a death penalty when one of the aggravating circumstances was found invalid, but instead would automatically impose a sen-

862 F.2d-28

tence of life imprisonment. Noting that, since *Cartwright's* conviction, the Oklahoma Court of Criminal Appeals had determined that it would not necessarily set aside a death penalty where on appeal one of several aggravating circumstances was found invalid, the Court wrote that "[w]hat significance these decisions of the Court of Criminal Appeals have for the present case is a matter for the state courts to decide in the first instance." *Maynard*, 108 S.Ct. at 1860. By contrast, the Mississippi Supreme Court has held that a death sentence should be upheld even though an aggravating circumstance is found invalid or unsupported by the evidence, so long as at least one aggravating circumstance remains. See, e.g., *Lanier v. State*, 533 So.2d 473 (Miss. 1988) (en banc); *Johnson v. State*, 511 So.2d 1333, 1337 (Miss.1987), *rev'd on other grounds*, — U.S. —, 108 S.Ct. 1981, 100 L.Ed.2d 375 (1988); *Irring v. State*, 498 So.2d 305, 314 (Miss.1986), *cert. denied*, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 826 (1987); *Edwards v. State*, 441 So.2d 84, 92 (Miss.1983).

(6) There is another reason that *Maynard* does not control the disposition of this case. In *Maynard*, the Supreme Court did not directly address the specific issue confronting us here: Must a death sentence be vacated when one of the three statutory aggravating circumstances found by the jury is subsequently held to be invalid and the jury was instructed to weigh the statutory aggravating circumstances against all mitigating circumstances in determining an appropriate sentence? For the reasons given below, we conclude that it must not.

The Supreme Court, in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 253 (1983), addressed a similar issue involving Georgia's capital sentencing scheme. In *Zant*, a jury found the defendant guilty of murder. The court then instructed the jury at the sentencing phase of the trial that it must find one or more statutory aggravating circumstances in order to fix punishment at death, but that in determining the appropriate sentence, "the jury was authorized to consider all of the evidence

D. Lesser Included Offense

(7) Stringer next complains that the trial court erred in failing to instruct the jury on a lesser included offense of non-capital murder or manslaughter. This is a new complaint, but it has no merit. Stringer introduced no evidence on which the jury rationally could have found him guilty of a lesser offense and acquitted him of the greater offense. See *Beck v. Alabama*, 447 U.S. 625, 635, 100 S.Ct. 2382, 2386, 65 L.Ed.2d 392 (1980) (quoting *Keble v. United States*, 412 U.S. 205, 208, 93 S.Ct. 1933, 1935, 36 L.Ed.2d 844 (1973)). Under the evidence presented at trial, either Stringer led a gang of robbers with the intent to murder the two victims, or he was at home nursing a back pain.

IV. Assistance of Trial Counsel

A. Failure to Present Mitigating Evidence

Stringer asserts that his right to the effective assistance of counsel at trial was violated in that his trial counsel neither prepared nor presented a case in mitigation at the sentencing phase of the trial. The district court held an evidentiary hearing limited to the issues of the effectiveness of trial and appellate counsel and found that Stringer did receive effective assistance. Stringer's trial attorneys, Sam Wilkins and James Nelson, and Stringer's appellate counsel, Harry Kelly, testified at the hearing.

(8, 9) The United States Supreme Court articulated the standard by which we evaluate the effectiveness of counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order for a convicted defendant's ineffective assistance claim to prevail, he must show both that counsel's performance was deficient and that the deficiency actually prejudiced his defense, thereby making the result of the trial unreliable. *Id.* at 687, 104 S.Ct. at 2064. Because it is all too easy for a reviewing court to conclude that a particular defense was unreasonable once that defense has proved unsuccessful, we give great deference to counsel's performance

admissible and prejudicial.

That the jury was instructed to weigh statutory aggravating circumstances does not alter the federal decision. We see no difference, other than one in semantics, between instructing a jury to weigh aggravating against mitigating circumstances in determining the sentence and instructing a jury to consider all aggravating and mitigating circumstances in deciding on the sentence. Had this jury been instructed as the jury was in *Zant*, it would have been constitutionally authorized to consider as aggravating all the facts and circumstances surrounding the crime—for instance, whether it believed the crime to be heinous, atrocious, or cruel—and to use those considerations in arriving at a sentencing decision. That it was not so instructed, that is, that the court limited its consideration to only statutory aggravating circumstances, is a matter of state law only. *Zant*, 103 S.Ct. at 2743 n. 17. We look to Mississippi to decide the impact of the invalid aggravating circumstance on Stringer's death sentence. Mississippi has held that the invalidation of an aggravating circumstance will not affect the death sentence so long as there is at least one valid aggravating circumstance remaining. Here, two valid aggravating circumstances remained. We overrule Stringer's argument.

and evaluate its reasonableness in light of the facts and circumstances as they appeared to exist at the time of trial. *Id.* at 689, 104 S.Ct. at 2065. Applying this standard to the facts before us, we conclude that Stringer received effective assistance at trial.

At the district court's hearing, Wilkins testified that he had spent the majority of his time preparing for the guilt phase of the trial and that he was "devastated" when the jury returned a guilty verdict. He testified further that he could not recall the details of what occurred between the announcement of the guilty verdict and the sentencing phase of the trial or how the decision was reached not to present mitigating evidence. Wilkins did state, however, that he had not formally investigated possible mitigating evidence since he already had personal knowledge of Stringer's background and friends.

Nelson, Wilkins' associate, testified that he and Wilkins conferred with Stringer following the conclusion of the trial's guilt phase, at which time they explained the purpose of the mitigation case and discussed which family members could testify. According to Nelson, Stringer told them in no uncertain terms that he did not want his family to testify in his behalf. Stringer did not testify at the hearing. It is now argued that even if Stringer forbade the use of family members as witnesses, he did not prohibit the use of other witnesses or other evidence.

[110] The failure to present a case in mitigation during the sentencing phase of a capital murder trial is not, *per se*, ineffective assistance of counsel. This court has often upheld decisions not to put on mitigating evidence where the decision resulted from a strategic choice. See, e.g., *Moore v. Maggio*, 740 F.2d 308, 315-16 (5th Cir. 1984), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985); *Lorenfield v. Phelps*, 817 F.2d 285, 291 (5th Cir. 1987), *aff'd*, — U.S. —, 104 S.Ct. 546, 98 L.Ed. 2d 568 (1988).

[111] Stringer contends, however, that Wilkins made no strategic choice in this case and cites as proof Wilkins' statement

at the habeas proceeding that he had no reason based on sound trial strategy for not preparing and presenting certain witnesses for the sentencing decision. We disagree. In concluding that Stringer received effective assistance at trial, the district court apparently discredited much of Wilkins' testimony, which it was entitled to do. Furthermore, the district court had good reason to see Wilkins' decision not to present additional mitigating evidence as understandable strategy. We agree with the district court for the reasons originally given by the Mississippi Supreme Court upon the direct appeal. 454 So.2d at 475-78.

The jury, in returning a guilty verdict, showed what they thought of Stringer's alibi. They had found him guilty of a deliberate massacre of innocent human beings. The testimony of someone who had known and liked Stringer years ago was not going to lessen the impact of that evidence. Stringer's only hope was to get at least one juror to have enough misgiving regarding his guilt to block the death penalty. Wilkins attempted to do just that by arguing that he and his client had to accept the verdict of guilty but that any qualms a juror might have regarding Stringer's guilt should be resolved against imposing the death penalty. On the record before us, we are in no position to say that this was not the best that could be done for Stringer.

[112] Furthermore, Stringer has been unable to establish that he was prejudiced by trial counsel's performance. Stringer asserts that Wilkins should have presented evidence of his war record, his medical record, and his reputation as a businessman and family man in mitigation. Based on the State's evidence presented during the guilt phase, which the jury obviously believed, we cannot conclude that there is a reasonable probability that, but for Wilkins' failure to present this evidence, the result of the proceeding would have been different. See *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

guilt, but also it would have sent the wrong message to the jury regarding Stringer's character and family commitment. Stringer has failed to demonstrate an actual conflict.

V. Assistance of Appellate Counsel

[118] Stringer next contends that he was denied effective assistance of counsel on appeal due to his appellate attorney's alleged conflict of interest. Harry Kelly took over representation of both Stringer and his son, Jimbo, following Stringer's conviction for murder. Stringer primarily urges in regard to this claim that Kelly rendered ineffective assistance of counsel because he failed to raise two issues in Stringer's appeal that he did raise in Jimbo's case. Those two issues were (1) the use of graphic photographs of the McWilliams and (2) the use of a facsimile riot gun.

Kelly testified at the hearing below that in conducting Stringer's appeal he had chosen to concentrate only on what he considered to be the strongest arguments for Stringer. The Supreme Court stated in *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987 (1983)), that the "process of 'winnowing out' weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Stringer asserts, however, that Kelly did not, in fact, winnow out only the weaker arguments from Stringer's appeal. To support his contention, Stringer points to the two issues excluded from Stringer's appeal that were included in Jimbo's appeal and the additional points Kelly raised in the brief supporting Stringer's motion for rehearing filed with the Mississippi Supreme Court.

That Kelly could have raised additional points on appeal and that he did raise additional points in a motion for rehearing do not indicate that he did not "winnow out" the weaker arguments from Stringer's ap-

B. Conflict of Interest

Stringer also asserts that his trial counsel was ineffective because he had a conflict of interest. Stringer bases his claim on the fact that Wilkins represented two other codefendants in addition to Stringer.

[112, 114] "Requiring or permitting a single attorney to represent codefendants . . . is not *per se* violative of constitutional guarantees of effective assistance of counsel." *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638 (1987) (quoting *Holloway v. Arkansas*, 435 U.S. 475, 482, 98 S.Ct. 1173, 1178, 55 L.Ed.2d 426 (1978)). In order to prevail on such a claim, having made no objection at trial, Stringer must demonstrate that an actual conflict existed by pointing to specific instances in the record which reflect that Wilkins' performance in his behalf was adversely affected. See *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 323 (1980); *United States v. Foz*, 613 F.2d 99, 102 (5th Cir. 1980). Speculative or merely hypothetical conflicts do not implicate the Sixth Amendment right to the effective assistance of counsel. *Baty v. Bulcom*, 661 F.2d 391, 395 (5th Cir. Unit B Nov. 1981), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); *Fozworth v. Wainwright*, 516 F.2d 1072, 1077 n. 7 (5th Cir. 1975). The petitioner must specifically identify instances in the record that reflect that his counsel "made a choice between possible alternative courses of action such as eliciting (or failing to elicit) evidence, helpful to one client but harmful to the other." *United States v. Merz*, 701 F.2d 1321, 1328 (11th Cir.) (quoting Comment, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants*, 68 J.Crim.L. & Criminology 226, 232 (1977)), *cert. denied*, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983). Stringer has not made that showing here.

[115] Stringer contends that Wilkins' representation of both himself and his son and codefendant, Jimbo Stringer, was an obvious actual conflict of interest because, under the State's theory, Jimbo was targeted as a triggerman while Stringer was not. These facts alone do not establish an actual

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conflict of interest. Stringer's defense was alibi, and all three of Wilkins' clients told the same story. At the time that Wilkins undertook the representation of the codefendants, he told them that if they all were telling the truth he would have no conflict of interest, but that if they had in fact committed the charged crime then he would have a conflict of interest. All three stood by their stories, as did the other alibi witnesses who spoke with Wilkins. Stringer did not contradict Wilkins' testimony regarding this discussion at the hearing, and the district court accepted Wilkins' testimony as true.

[116] Stringer next alleges that an actual conflict is evident based on the prosecution's reference in closing argument to five of the six defense witnesses as "Sam's Army." Each of those five witnesses had testified that Sam Wilkins represented him or her. The prosecution, in an attempt to discredit the witnesses, stated during argument that one of the many unanswered questions in the case was why all of these witnesses chose Sam Wilkins as their lawyer. Stringer argues that Wilkins' readiness to represent so many people involved in the case that the prosecutor could get away with referring to the defense witnesses collectively as "Sam's Army" worked to his detriment in that Wilkins never discussed other possible defenses that might be raised in Stringer's behalf. But that suggests no conflict; no other defenses were discussed for the simple reason that this defense, assuming its truth, was the only defense for all of his clients.

[117] Stringer also claims that Wilkins' performance reflected a conflict of interest at the trial's sentencing phase. He asserts that Wilkins should have argued to the jury that even under the State's theory of the case, he was not the triggerman who actually killed Nell McWilliams. To make such an argument would have shown Stringer's willingness to lay the blame for the murder on his own son in order to save himself. Wilkins testified that "even in retrospect" he would not have made this argument. Not only would it have undermined any doubt the jurors had regarding Stringer's

certain photographs of the murder scene violated his due process rights. Stringer did not present this claim to the district court and therefore we need not consider it on appeal. See *Wille*, 737 F.2d at 1387-88 n. 20. Furthermore, the evidence clearly does not offend constitutional due process. The stay of sentence is vacated. The judgment of the district court denying the writ is AFFIRMED.

JOHNSON, Circuit Judge, dissenting.

It cannot be stated often enough that "death is qualitatively different from other punishments that can be imposed by the state." *Cartwright v. Maynard*, 822 F.2d 1477, 1483 (10th Cir. 1987) (en banc), *aff'd*, — U.S. —, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). Because of the finality attendant with the punishment of death, it is critical that the process by which a criminal defendant is sentenced to death not be one tainted by error which could result in the imposition of the death sentence in a manner inconsistent with constitutional guarantees. In the instant case, an error of constitutional magnitude flawed the decision of the jury to sentence defendant James Stringer to death. Specifically, the jury was permitted to consider an constitutionally vague statutory aggravating circumstance during its sentencing deliberations, deliberations which involved the balancing of statutory aggravating and mitigating circumstances. Further, the improper consideration by the jury of the invalid aggravating circumstance was not cured on appeal by the Mississippi Supreme Court. Moreover, the unconstitutionally vague aggravating circumstance was vigorously argued to the jury by the prosecutor as a justification for imposing the death sentence on Stringer. Today, a majority of this panel concludes that the above error does not necessitate a resentencing of Stringer. Persuaded that the eighth and fourteenth amendments to the Constitution demand the reversal of Stringer's death sentence which was imposed pursuant to a sentencing determination that included the consideration by the jury of an unconstitutional statutory aggravating circumstance

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in the balancing of aggravating and mitigating factors, I respectfully dissent.

Pursuant to the Mississippi death penalty scheme, defendants eligible for conviction for capital murder are limited to defendants committing murders in eight situations: murder of a peace officer or fireman; murder committed while under sentence of life imprisonment; murder committed by use of an explosive device; murder committed for remuneration; killing committed in the course of burglary, robbery, kidnapping, arson, rape, and other sexual offenses; killing committed in the course of felonious abuse of a child; and murder of an elected official. Miss. Code Ann. § 97-3-19(2) (Supp. 1987). By limiting the types of murders which may be classified as capital murders in such a fashion, Mississippi narrows the class of defendants eligible to receive the death penalty. Following the conviction of a defendant for capital murder in Mississippi, the jury is next required to determine whether any statutory aggravating circumstances exist to justify the imposition of the death penalty. To impose the death penalty on a defendant, the jury must find at least one aggravating circumstance. Miss. Code Ann. § 99-19-103 (Supp. 1987); *Johnson v. Thigpen*, 806 F.2d 1243, 1247 (5th Cir. 1986), *cert. denied*, 480 U.S. 951, 107 S.Ct. 1618, 94 L.Ed.2d 802 (1987). After finding that at least one statutory aggravating circumstance exists, the jury is then required to weigh the statutory aggravating circumstances found against any mitigating circumstances found in deciding the appropriate punishment. Miss. Code Ann. § 99-19-103.

Pursuant to this process, the jury in the instant case found three statutory aggravating circumstances and, pursuant to the balancing analysis described above, sentenced Stringer to death. Specifically, the jury found the following three statutory aggravating circumstances in Stringer's case: (1) that the murder was intentional and committed while engaged in an attempt to commit robbery for pecuniary gain; (2) that the murder was committed for the purpose of avoiding or preventing detection and lawful arrest; and (3) that

VI. Photographs

[119] Finally, Stringer asserts for the first time on appeal that the admission of

the murder was especially heinous, atrocious, or cruel. On appeal, Stringer challenges the constitutionality of the "especially heinous" aggravating circumstance, asserting that the aggravating circumstance is unconstitutionally vague.

Last term, the Supreme Court addressed the constitutionality of the especially heinous aggravating circumstance as applied under Oklahoma law in *Maynard v. Cartwright*, — U.S. —, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), explaining the concept of vagueness in the context of capital punishment in the following manner:

Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972).

108 S.Ct. at 1858.

In *Maynard*, as will be discussed in greater detail subsequently, the Supreme Court held that the especially heinous aggravating circumstance as applied by the Oklahoma courts was unconstitutionally vague. *Id.* at 1859. In the instant appeal Stringer relies on the *Maynard* decision in seeking a reversal of his death sentence. The majority today nevertheless concludes that Stringer's claim in this regard is foreclosed by the recent decision of this Court in *Edwards v. Scroggys*, 849 F.2d 204 (5th Cir.1988), *petition for cert. filed*, — U.S. L.W. — (U.S. Oct. 18, 1988).

In *Edwards*, a Mississippi capital murder case, the defendant Edwards was sentenced to death after the jury found six statutory aggravating circumstances. The *Edwards* Court, in rejecting a claim that the invalidation of one of the six statutory aggravating circumstances necessitated a resentencing of Edwards, relied on the holding by the Supreme Court in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), that "the invalidation of

one aggravating circumstance [does] not require the vacation of the death penalty so long as there [are] other valid aggravating circumstances remaining." *Edwards*, 849 F.2d at 211. The *Edwards* Court, addressing the impact of the recent decision of the Supreme Court in *Maynard*, then reasoned that the *Maynard* decision was distinguishable for the reason that the Oklahoma law reviewed in *Maynard* was unclear regarding the effect of the invalidation of one aggravating circumstance on the validity of a death sentence. The *Edwards* Court thereafter, in contrast, stated "Mississippi law is clear that one invalid aggravating circumstance will not suffice to overturn a death penalty where other valid aggravating circumstances remain." *Edwards*, 849 F.2d at 211 n. 7 (citation omitted). Thus, relying on the above distinction of the *Maynard* decision, the *Edwards* Court refused to vacate Edwards' death sentence.

The *Edwards* opinion, as stated by the majority, now constitutes Circuit precedent; nevertheless, I feel compelled to address what I perceive to be an important issue left unaddressed by this Court in *Edwards* and one which was purposefully reserved by the Supreme Court in *Zant*—that issue being the effect on the validity of a death sentence of a holding that "a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." *Zant*, 462 U.S. at 890, 103 S.Ct. at 2749.

In *Zant v. Stephens*, the Supreme Court concluded that the validity of a death sentence based in part on the consideration by the jury of an invalid aggravating circumstance "depends on the function of the jury's finding of an aggravating circumstance under [a state's] capital sentencing statute, and on the reasons that the aggravating circumstance at issue . . . was found to be invalid." *Id.* at 864, 103 S.Ct. at 2736. See also *Cartwright v. Maynard*, 822 F.2d 1477. In *Zant*, the Supreme Court addressed the validity of a death sentence

imposed pursuant to Georgia law under circumstances where the jury, in sentencing the defendant Stephens to death, was permitted to consider a statutory aggravating circumstance subsequently declared invalid by the Georgia Supreme Court. In its analysis of *Zant*, the Supreme Court initially noted that the function of a jury's finding of an aggravating circumstance under the Georgia capital sentencing scheme is to narrow the class of individuals eligible to receive the death penalty. In this regard, as long as one aggravating circumstance is found by the jury, the threshold dividing murderers in Georgia that are eligible for the death penalty and those murderers that are not so eligible, is crossed. *Zant*, 462 U.S. at 870-72, 103 S.Ct. at 2739-40. Significantly, the *Zant* Court noted that a function which an aggravating circumstance does not serve under the Georgia statute is that of guiding the discretion of the sentencer in deciding whether to impose life imprisonment or death. *Id.* at 874, 103 S.Ct. at 2741. Georgia, unlike other states, does not instruct its juries "to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard." *Id.* at 873-74, 103 S.Ct. at 2740-41.

After noting the function, as described above, of an aggravating circumstance under the Georgia capital scheme, the Supreme Court in *Zant* concluded that the existence of two valid aggravating circumstances served the constitutional requirement of narrowing the class of persons eligible for the death penalty despite the consideration by the jury of a third aggravating circumstance—that the defendant had "a substantial history of serious assaultive criminal convictions"—which had been declared unconstitutionally vague. *Id.* at 879, 103 S.Ct. at 2744. Thus, concluding that the defendant Stephens had already crossed the threshold into the class of individuals eligible for the death penalty by virtue of the two valid statutory aggravating circumstances found by the jury, the Supreme Court determined that the jury's

1858P.

Finally, we note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.

Id. at 890, 103 S.Ct. at 2750.

Recently, in the Tenth Circuit's en banc treatment of *Cartwright v. Maynard*, that

court confronted the above question reserved by the Supreme Court in *Zant* regarding the effect of an invalid aggravating circumstance on the validity of a death sentence imposed pursuant to a capital sentencing scheme under which a jury is required to balance statutory aggravating and mitigating circumstances in exercising its discretion to impose the death penalty. *Maynard*, 822 F.2d 1477. In the Tenth Circuit's en banc *Maynard* opinion, a case in which the court was reviewing the validity of a death sentence imposed under Oklahoma law, the Tenth Circuit engaged in an extensive discussion of the Supreme Court's pronouncements addressing the effect of a jury's consideration of an invalid aggravating circumstance on the validity of a death sentence. The Tenth Circuit *Maynard* court observed that the Supreme Court decisions in this area "leave open the question of whether a sentencing authority that must weigh all statutory factors [aggravating and mitigating] may consider constitutionally invalid aggravating circumstances." *Maynard*, 822 F.2d at 1482 (quoting Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 Cornell L. Rev. 1629, 1681 (1984)). In resolving the above question in *Maynard*, the Tenth Circuit applied the language of the Supreme Court in *Zant* regarding the function of an aggravating circumstance under a capital scheme and the reason a particular aggravating circumstance is invalid.

On the function of an aggravating circumstance under Oklahoma law, the en banc *Maynard* court stated that "[t]he purpose of an aggravating circumstance in the Oklahoma statute is decidedly different from the purpose of an aggravating circumstance in the Georgia statute considered in *Zant*." *Id.* at 1480. Pursuant to Oklahoma law, any first degree murder is eligible to be classified as a capital murder and thus, the purpose of an aggravating circumstance under the Oklahoma capital sentencing scheme is not to narrow the class of persons eligible to receive the death penalty. Instead, "Oklahoma uses an aggravating circumstance to guide the discretion of the sentencer in determining

independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered [an invalid aggravating circumstance]." *Goode*, 464 U.S. at 86-87, 104 S.Ct. at 383-84.

In *Maynard*, the Tenth Circuit distinguished the defendant Cartwright's case from that of the invalid aggravating circumstances at issue in *Barclay* and *Goode* on the basis that the invalid aggravating circumstance in Cartwright's case—the identical "heinous, atrocious, or cruel" circumstance at issue in the instant appeal by Stringer—was invalid not under state law, but under federal constitutional law. *Maynard*, 822 F.2d at 1480. Further, the Tenth Circuit in *Maynard* noted that Oklahoma courts do not provide for a method of appellate review whereby the Oklahoma appellate courts may independently reweigh only the valid aggravating and mitigating circumstances in a capital case so as to cure on appeal a sentencer's consideration of an invalid aggravating circumstance. *Id.*

On the basis of the above observations regarding the function of an aggravating circumstance in Oklahoma and the reason the especially heinous aggravating circumstance was invalid, the Tenth Circuit ultimately concluded that:

[R]eliance upon an aggravating circumstance that is invalid under the federal constitution could affect the balance struck by the sentencer. The improper reliance is not corrected by the state appellate review process and is not a matter of state law beyond the review of a federal court in a habeas corpus proceeding. A death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth Amendments. We therefore must consider Cartwright's allegation that Oklahoma's application of the "especially heinous, atrocious, or cruel" aggravating circumstance in this case was unconstitutionally vague.

Id. at 1482-83. After reaching the above conclusion, the Tenth Circuit then proceed-

ed to hold that the especially heinous aggravating circumstance as applied pursuant to Oklahoma law was in fact unconstitutionally vague under the Federal Constitution. *Id.* at 1483-91. The Tenth Circuit reasoned that it was therefore presented with the question of whether or not the court could sua sponte apply a limiting construction of the especially heinous aggravating circumstance to the facts of Cartwright's case so as to cure any error by the jury in considering the unconstitutional aggravating circumstance. Observing that Oklahoma had adopted no such limiting construction, the Tenth Circuit determined that the fashioning of such a saving construction must be made by the State in the first instance and accordingly, remanded Cartwright's case to the state courts for a redetermination of his sentence. *Id.* at 1492.

Thereafter, the Supreme Court, reviewing the en banc decision of the Tenth Circuit in *Maynard*, affirmed the holding by the Tenth Circuit that the language of the especially heinous aggravating circumstance was unconstitutionally vague under the eighth and fourteenth amendments. *Maynard*, — U.S. —, 108 S.Ct. at 1859. However, the Supreme Court did not comment on the further conclusion by the Tenth Circuit that a death sentence imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the eighth and fourteenth amendments. Instead, the Supreme Court in *Maynard*, recognizing, as did the Tenth Circuit, that Oklahoma had no provision for curing the consideration of an invalid aggravating circumstance on appeal, remanded Cartwright's case to the Oklahoma state courts for a redetermination of the appropriate sentence. In this regard, the Supreme Court stated that:

It is true that since the decision of the Court of Appeals, the Oklahoma Court of Criminal Appeals has restricted the heinous, atrocious, or cruel aggravating circumstance to those murders in which torture or serious physical abuse is present. At the same time, that court decided that it would not necessarily set aside a death

penalty where on appeal one of several aggravating circumstances has been found invalid or unsupported by the evidence.

What significance these decisions of the Court of Criminal Appeals have for the present cases is a matter for the state courts to decide in the first instance.

Maynard, — U.S. —, 106 S.Ct. at 1860 (citations omitted).

Turning to the facts of the case sub judice, it is observed that the function of an aggravating circumstance under the Mississippi capital sentencing scheme constitutes a hybrid between that of the function of the aggravating circumstance under the Georgia capital scheme reviewed in *Zant* and the aggravating circumstance under the Oklahoma capital scheme reviewed in *Maynard*. Under the Mississippi scheme, a statutory aggravating circumstance serves not only to narrow the class of persons eligible for the death penalty, but also to guide the discretion of the sentencer in deciding whether or not to impose the death penalty. Regarding the latter, as required of a jury in Oklahoma, a jury in Mississippi is required to weigh statutory aggravating circumstances against mitigating circumstances in deciding whether to

1. The majority opinion points to the fact that the Mississippi Supreme Court, on appeal, reviews whether or not a sentence of death is imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the evidence is sufficient to support the jury's finding on each statutory aggravating circumstance; and whether the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. *Majority Opinion* at slip opinion p. 1303, at p. 1114. This type of appellate review, however, is not sufficient to cure on appeal the consideration by a sentencer of an invalid aggravating circumstance in weighing statutory aggravating and mitigating circumstances to determine whether or not to impose the death penalty on a particular defendant. Rather, as recognized by the U.S. Supreme Court in *Wainwright v. Goode*, the type of appellate review which would have a curative effect in such a situation is that review pursuant to which an appellate court independently rebalances only the valid aggravating circumstances found by the sentencer against the mitigating circumstances to determine if the death sentence is valid. *Goode*, 404 U.S. at 86-87, 104

impose the death penalty once a defendant has been convicted of a capital offense. Miss. Code Ann. § 99-19-103 (Supp. 1987). Thus, like the aggravating circumstance in Oklahoma, the aggravating circumstance in Mississippi's capital sentencing scheme "plays a critical role in guiding the discretion of the sentencer" in determining whether an individual defendant is sentenced to life or death. Further, as in Oklahoma, Mississippi provides no method for curing on appeal the improper consideration by a sentencer of an unconstitutional aggravating circumstance.¹ As a result, reliance on an unconstitutional aggravating circumstance by a jury in Mississippi could affect the delicate balance struck by the sentencer in deciding whether or not to impose the death penalty. I am persuaded, therefore, that this Court, like the Tenth Circuit in *Maynard*, must consider Stringer's assertion that the "heinous, atrocious, or cruel" circumstance as applied under Mississippi law is unconstitutionally vague.

On this question, it is noted that, in light of the recent holding by the Supreme Court in *Maynard* that the especially heinous aggravating circumstance is facially unconstitutional, any further inquiry in this area is limited to determining whether or not Mississippi applies a limiting construction of the especially heinous aggravating circumstance.

S.Ct. at 383-84. In fact, in *Cartwright v. Maynard*, the Tenth Circuit en banc rejected the proportionality review conducted by the Oklahoma Court of Criminal Appeals in that case as a justification for upholding the validity of the death sentence where the sentencer considered an unconstitutional aggravating circumstance. In doing so, the Tenth Circuit noted that Supreme Court decisions do not in any manner suggest "that a proportionality review [can] serve as an independent basis for upholding a death sentence imposed after reliance upon an unconstitutional aggravating circumstance." *Cartwright*, 822 F.2d at 1461 n. 3.

Therefore, since Mississippi, like Oklahoma, does not provide a method for curing on appeal the improper consideration by a sentencer of an unconstitutional aggravating circumstance, the appellate review which was conducted by the Mississippi Supreme Court of Stringer's death sentence in the instant case cannot cure the jury's reliance upon the unconstitutional especially heinous aggravating circumstance in arriving at its decision to sentence Stringer to death.

which was later determined to be invalid. In rejecting a harmless error analysis under the facts of the *Johnson* case, the Mississippi Supreme Court relied on the fact that the "district attorney argued this particular aggravating circumstance as a reason to impose the death penalty." *Id.* This decision by the Mississippi Supreme Court to refrain from applying a harmless error analysis was cited with approval last term by the Supreme Court in *Johnson v. Mississippi*, — U.S. —, 108 S.Ct. 1981, 1989 n. 8, 100 L.Ed.2d 575 (1988).

In the instant case, as in *Johnson*, the prosecutor vigorously argued as a justification for imposing the death sentence on defendant James Stringer the fact that the instant crime was especially heinous, atrocious, and cruel. In this regard, the prosecutor stressed repeatedly to the jury that if they should find only one aggravating circumstance to outweigh any mitigating circumstances, then the verdict should be the death penalty. Proceeding in such a fashion, the prosecutor then apparently showed photographic slides of the crime to the jury, describing in detail the facts of the murders and asking of the jury "Is that atrocious? Is that cruel?" This argument by the prosecutor certainly raises a question as to whether, under Mississippi law, Stringer would be entitled to a resentencing due to the jury's consideration of the unconstitutionally vague especially heinous aggravating circumstance. Moreover, it is highly suspect that the Mississippi capital sentencing scheme continues to channel the sentencer's discretion by "clear and objective standards" where an unconstitutionally vague aggravating circumstance is vigorously argued to the jury as a justification for imposing the death penalty. See *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 1765, 64 L.Ed.2d 398 (1980). Therefore, contrary to the conclusion reached by the majority today, this Court's decision in *Edwards* does not foreclose Stringer's request for habeas corpus relief in the instant appeal. Mississippi law is not well settled on the aspect of a jury's consideration of an invalid aggravating circumstance in a capital sentencing proceeding where that circumstance has been vigorously argued to the jury as a basis for the death penalty. Accordingly, I would remand the instant proceeding to the state courts for a redetermination of Stringer's sentence.

As a final note, I would harken back to the previously mentioned fact that this Court has consistently declined to recognize or address the vital issue of the effect on the validity of a death sentence of a jury's consideration of an unconstitutional aggravating circumstance pursuant to a capital sentencing scheme which requires a sentencer to balance all statutory aggravating circumstances against all mitigating circumstances in deciding whether or not to impose the death penalty. For the reasons set forth by the Tenth Circuit in its en banc opinion in *Maynard* and discussed more fully above, I would conclude, and urge this Court to also conclude, that the consideration of an unconstitutional aggravating circumstance under a capital sentencing scheme which requires a jury to balance aggravating and mitigating circumstances and which is not effectively cured on appeal must be vacated under the eighth and fourteenth amendments. It is absolutely imperative that a death sentence not be imposed pursuant to a sentencing process which fails to protect against the imposition of our most severe and final punishment in an arbitrary or capricious fashion.



Carl Eugene KELLY,
Petitioner-Appellant,
v.
James A. LYNNAUGH, Director, Texas
Department of Corrections,
Respondent-Appellee.

No. 87-1520.
United States Court of Appeals,
Fifth Circuit.

Dec. 22, 1988.

Murder defendant under sentence of death filed federal habeas corpus petition.

stance in reviewing a death sentence on appeal. In this connection, this Court, in *Johnson v. Thigpen*, 806 F.2d 1243, noted that the Mississippi Supreme Court, in *Coleman v. State*, 378 So.2d 640 (Miss. 1979), had indeed adopted a limiting construction of the especially heinous aggravating circumstance to be applied in conducting appellate review of death sentences. However, in reviewing Mississippi's actual application of the limiting construction adopted in *Coleman*, this Court in *Johnson* concluded that:

[T]he Mississippi Supreme Court has not consistently applied its *Coleman* limiting construction of the especially heinous aggravating circumstance. The limiting construction we found in *Gray* [v. *Lucena*, 677 F.2d 1086 (5th Cir. 1982)] had been adopted in *Coleman* appears now to be more honored in breach than observance.

Johnson, 806 F.2d at 1247. Despite recognizing that the Mississippi Supreme Court no longer applies a limiting construction to the especially heinous aggravating circumstance, this Court upheld the death sentence imposed in *Johnson* as constitutionally valid aggravating circumstances serve the constitutional requirement of narrowing the class of persons eligible for the death penalty under the Mississippi capital sentencing scheme. *Id.* at 1248. Further, the Court in *Johnson* concluded that even if error was present due to the broadened construction of the especially heinous aggravating circumstance, it was error under Mississippi, and not federal law, and thus, an error of state law not cognizable on habeas corpus review. *Id.* at 1249.

Since *Johnson*, however, the Supreme Court has decided *Maynard v. Cartwright*. *Maynard* now teaches that the especially heinous aggravating circumstance is unconstitutionally vague in violation of federal, not state law. Therefore, any error in this regard is cognizable by this Court on habeas corpus review. Moreover, as observed by this Court in *Johnson*, the Mississippi courts no longer apply a limiting construction to the especially heinous aggravating circumstance to cure on appeal the sentencer's reliance on an unconstitutional

The District Court for the Western District of Texas, James R. Nowlin, J., denied the writ, and petitioner appealed. The Court of Appeals held that: (1) defendant's right to terminate questioning was scrupulously honored and thus he was not denied his right against self-incrimination; (2) petitioner voluntarily waived his right to remain silent; (3) petitioner failed to show he was denied effective assistance of counsel; and (4) venireman was properly excused from jury.

Affirmed.
Murder defendant whose trial counsel was allegedly ineffective in failing to request charge on mitigation of punishment due to voluntary intoxication failed to show any resultant prejudice in a case in which the evidence might have been a "double-edged sword," and in which the decision thus involved judgment call by trial counsel. U.S.C.A. Const. Amend. 6.

5. Habeas Corpus — 90-2(3)

District court was not required to hold evidentiary hearing to determine whether federal habeas petitioner's trial counsel's failure to request charge on mitigation was due to ineffectiveness absent petitioner's allegation of facts which, if proved, would overcome presumptions that trial counsel was effective and that trial conduct was the product of reasoned strategy decisions. U.S.C.A. Const. Amend. 6.

6. Criminal Law — 641.13(7)

Petitioner was not denied effective assistance of counsel by appellate counsel's failure to raise admissibility of confession on appeal where petitioner suffered no prejudice because the en banc Texas Court of Criminal Appeals specifically reviewed confession issue. U.S.C.A. Const. Amend. 6.

7. Homicide — 357(4)

Even if evidence of murder defendant's voluntary intoxication could be considered mitigating, it could clearly be given full effect by jury in deciding whether defendant acted deliberately, and thus did not support defendant's attack on constitutionality of Texas capital punishment scheme which allegedly was flawed because it prevented jury from considering mitigating evidence except on issues of deliberateness of murder and probability of future dangerousness.

8. Jury — 108

Venireman whose answers to questions during voir dire indicated he would not vote to impose death penalty, no matter what the evidence was, was properly excused from capital murder trial.

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ORIGINAL

NO. 90-6616 (3)

Supreme Court, U.S.

FILED

MAR 8 1991

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1990 TERM

=====

JAMES R. STRINGER

PETITIONER

VERSUS

LEE ROY BLACK, COMMISSIONER,
Mississippi Department of Corrections

RESPONDENT

=====

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF IN OPPOSITION

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

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QUESTIONS PRESENTED

I. Where The Court Below Has Held That This Court's Decision In Clemons v. Mississippi, Creates A New Rule And Therefore Has No Application In Petitioner's Federal Habeas Petition, Certiorari Should Be Denied.

II. Where the State Supreme Court held the claim relating to the "especially heinous" aggravating circumstance to be procedurally barred and this bar was recognized by the United States District Court, the fact that the Court of Appeals addresses the merits of the claim does not waive the bar. The claim remains procedurally barred and therefore certiorari should be denied.

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NO. 90-6616

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1988 TERM

=====

JAMES R. STRINGER

PETITIONER

VERSUS

LEE ROY BLACK, COMMISSIONER,
Mississippi Department of Corrections

RESPONDENT

=====

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Respondent, Lee Roy Black, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as Stringer v. Black, 909 F.2d 111 (5th Cir. 1990). A copy of this opinion is before this Court as Exhibit A to the petition for certiorari. The earlier opinion of the Court of Appeals in this case prior to remand

by this Court is reported as Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988). A copy of this opinion is before the Court as Exhibit B to the petition for certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C.A. Section 1254(1). He fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendment VIII and Amendment XIV.

STATEMENT OF THE CASE

A. FACTUAL HISTORY

The conviction and sentence of death arise out of the June 21, 1982 armed robbery and murder of Ray McWilliams and his wife Nell in their home. Petitioner, his son and several others went to the McWilliams' home to rob them of a large amount of cash and jewels supposedly kept there in a safe. The brutal facts of this crime are graphically and sufficiently set forth in the opinion of the Mississippi Supreme Court and we would adopt them as our statement of facts here. Stringer v. State, 454 So.2d 468, 471-473 (Miss. 1984).

B. PROCEDURAL HISTORY

Petitioner was indicted for capital murder by the grand jury of the Circuit Court of Hinds County, Mississippi, First

Judicial District, during the July 1982 Term of said court. Petitioner's trial was conducted during the September 1982 Term of said court before a properly empaneled jury. After hearing the evidence and being fully instructed as to the law the jury returned a verdict of guilty of capital murder. The trial then proceeded to the issue of sentence. At the conclusion of the sentencing phase of the trial the jury returned a sentence of death in proper form, finding that the following aggravating circumstances existed:

We the jury, unanimously find that the aggravating circumstances of:

1. The Defendant contemplated that life would be taken and/or the capital murder was intentionally committed and that the Defendant was engaged in an attempt to commit a robbery; and was committed for pecuniary gain.

2. The capital murder was committed for the purpose of avoiding or preventing the detection and lawful arrest of James R. Stringer, the Defendant.

3. The capital murder was especially heinous, atrocious or cruel.

Tr. 1435.

After trial, but prior to the perfection of the direct appeal in this case, a Petition for Writ of Error Coram Nobis was filed in the Circuit Court. After an evidentiary hearing was conducted on this petition it was denied. An appeal was taken to the Mississippi Supreme Court challenging the conviction of capital murder and the death sentence and the denial of the petition for writ of error coram nobis. On his

automatic appeal to the state supreme court petitioner raised the following claims:

On direct appeal:

1. The Court erred in allowing the District Attorney to cross examine the appellant about his unwillingness to submit to a lie detector test, over the objection of counsel and in admitting into evidence an agreement between the district attorney's office and the witnesses, Brock and Medders to have their version of the events corroborated by a lie detector test, this admission into evidence although not objected to at the time is plain error under the rules of this Court.

2. It was highly improper and prejudicial for the Trial Court to permit the state to question the defense witnesses, Tammy Williams, and the defendant, James Stringer, about what drugs they had used or were using and to allow into evidence against the defendant a weapon concealed in his boot at the time of his arrest which bore no relation to the crime.

3. Appellant was deprived of effective assistance of counsel.

4. The Court erred in allowing the District Attorney to ask and elicit an answer from the defense witness, Tammy Williams, that she had been "charged" with conspiracy to commit murder and accessory after the fact.

5. The appellant respectfully submits that this case should be reversed if for no other reason that on the basis of the entire record, taking all errors and prejudicial matter into consideration, the defendant was deprived of a fair trial.

On error coram nobis appeal:

1. The court erred in allowing the witness Walter Owens, III to invoke the Fifth Amendment.

2. The court erred in not allowing defense counsel to amend his petition to include the destruction of the tape.

Stringer v. State, 454 So.2d at 479, 480.

These two appeals were consolidated and heard together. On July 11, 1984, the Mississippi Supreme Court unanimously affirmed the conviction and sentence of death entered by the Hinds County jury and also affirmed the denial of coram nobis relief. A petition for rehearing was filed and the original opinion was modified on denial of the petition for rehearing on August 15, 1984. Stringer v. State, 454 So.2d 468 (Miss. 1994). This modification did not disturb the affirmance of the conviction and death sentence.

Stringer then petitioned this Court to grant a petition for writ of certiorari to the Mississippi Supreme Court. This petition stated as its Questions Presented the following claims:

1. Was petitioner denied effective assistance of counsel in violation of the 6th and 14th Amendments?
2. Did cross examination about refusal to take a polygraph test offend the 5th and 14th Amendments?
3. Did refusal to instruct jury during the penalty stage of capital trial that jury could grant mercy even if the aggravating circumstances outweigh mitigating circumstances offend the 8th and 14th Amendments?
4. Where persons who expressed reservations about the death penalty improperly excluded [sic] from the jury in violation of the 6th and 14th Amendments?
5. Did the state courts erroneously conclude that the evidenced fully supported the findings of statutory aggravating circumstances in violation of the 8th and 14th Amendments?

Petition for Writ of Certiorari.

The State responded. In due course the petition was denied by this Court on February 19, 1985. Stringer v.

Mississippi, 469 U.S. 1230, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1985).

Petitioner then filed a Motion To Vacate Or Set Aside Judgment And Sentence with the Mississippi Supreme Court in compliance with Section 99-39-1, et seq., Miss. Code Ann. (Supp. 1988), raising numerous claims. On January 15, 1986 the Mississippi Supreme Court denied post-conviction relief with a written opinion. Stringer v. State, 485 So.2d 274 (Miss. 1986). A petition for rehearing was denied on April 9, 1986.

Petitioner then filed a petition for writ of certiorari from this denial of post-conviction relief claiming:

Was petitioner denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution where his trial attorney refused to present mitigation testimony from family members at the penalty phase of his capital trial because the trial attorney believed such testimony might compromise the defense of petitioner's son, who was also charged with capital murder for the same offense and who was represented by the same trial attorney?

This petition was denied on October 20, 1986 by this Court. Stringer v. Mississippi, 479 U.S. 922, 107 S.Ct. 327, 93 L.Ed.2d 300 (1986). The Mississippi Supreme Court then, on motion of the State, reset an execution date for petitioner.

In response petitioner filed a petition for writ of habeas corpus and motion for stay of execution with the United States District Court for the Southern District of Mississippi. A stay of execution was entered on January 12,

1987 by the District Court. On November 20, 1987, after conducting an evidentiary hearing, the District Court entered its Memorandum Opinion and Order denying relief on all issues. Stringer v. Scroggy, 675 F.Supp. 356 (S.D. Miss. 1987). A motion to alter or amend under Rule 59(e) was timely filed. This motion was denied with a five page written opinion on January 22, 1988. This opinion is unpublished. Stringer v. Scroggy, Civil Action No. J87-0015(B). Petitioner filed a notice of appeal and applied for a certificate of probable cause. The district court granted the requested certificate of probable cause.

Petitioner then pursued his appeal to the Court of Appeals for the Fifth Circuit. Briefs were filed and oral argument was had. On December 22, 1988 the Fifth Circuit issued its opinion affirming the denial of relief by the district court. Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988). A petition for panel rehearing and a suggestion for rehearing en banc were filed. These petitions were denied on January 20, 1989. Petitioner was granted a stay of the mandate in order to file his petition for writ of certiorari with this Court challenging the decision of the court of appeals.

On certiorari to this court from the decision of the Fifth Circuit petitioner presented three questions. These questions read:

1. Whether the Fifth Circuit erred in failing to find that an instruction requiring the jury to unanimously find mitigating circumstances before considering them

violates this Court's holding in Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1860 (1988).

2. Whether a United States Circuit Court of Appeals can automatically uphold a death sentence imposed after consideration of an unconstitutionally vague aggravating circumstance despite a state law requirement that the jury weight the statutory aggravating circumstances against all mitigating circumstances in determining the appropriate sentence.

3. Whether the Fifth Circuit Court of Appeals erred in holding that the trial court's refusal to grant a life option instruction did not result in a mandatory sentence of death by improperly limiting the jury's discretion.

Petition at i.

On April 16, 1990, this Court issued the following order:

The motion for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Clemons v. Mississippi, 494 U.S. ___ (1990).

Stringer v. Black, ___ U.S. ___, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990).

On remand to the Fifth Circuit for further consideration, petitioner presented two issues to the court of appeals. He presented the Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), issue and renewed his claim under Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 494 U.S. ___, 110 S.Ct. 1227 (1990).

On July 30, 1990, the Fifth Circuit issued its opinion on remand. The Court reinstated its prior affirmance of the denial of habeas relief holding that Clemons represented new

law and would not be applied retroactively to petitioner's case. The court of appeals did not address the Mills/McKoy argument on remand. Stringer v. Black, 909 F.2d 111 (5th Cir. 1990). The petition for rehearing and suggestion for rehearing en banc were denied on September 10, 1990. The mandate in this case was issued instanter on July 30, 1990. The Court refused to recall this mandate.

While this case was pending in the Fifth Circuit the petitioner filed a second and successive state post-conviction petition with the Mississippi Supreme Court raising these same issues. Petitioner requested that the Fifth Circuit stay proceedings while this Court considered the present petition. The Fifth Circuit refused to stay consideration of the issues presented on remand while the Mississippi Supreme considered whether it would entertain this second the petition. This petition is still pending before the Mississippi Supreme Court.

REASONS FOR DENYING THE WRIT

Petitioner has presented no claim to this Court that is in a procedural posture to be addressed. Further petitioner presents no cognizable claim under the Constitution of the United States and therefore certiorari should be denied.

ARGUMENT

I. Where The Court Below Has Held That This Court's Decision In Clemons v. Mississippi, Creates A New Rule And Therefore Has No Application In Petitioner's Federal Habeas Petition, Certiorari Should Be Denied.

When the Court below reconsidered this case in light of Clemons v. Mississippi, it found:

Stringer's conviction was final on February 129, 1985 when the Supreme Court denied his petition for writ of certiorari directed at his conviction and sentence. Stringer v. Mississippi, 469 U.S. 1230, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1985). At panel of the Fifth Circuit has recently held that claims raised under Clemons and Maynard are not available to a habeas petitioner whose conviction was final prior to these decisions, because they constitute a new rule of law under Teague. Smith v. Black, 904 F.2d 950, (5th Cir. 1990).

We therefore reinstate our previous judgment. Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988). The judgment of the district court denying the writ is AFFIRMED.

990 F.2d at 111.

In order to find the reasons underpinning the decision by the Fifth Circuit we must look to the decision in Smith v. Black, 904 F.2d 950 (5th Cir. 1990). The Smith v. Black decision was entered on June 26, 1990, and the petitions for rehearing and rehearing En Banc were denied on August 24, 1990.

The court below held that this Court "limited for the first time Mississippi's practice of supporting a death sentence on the basis of a remaining, valid aggravating

factor." 904 F.2d at 983. Judge King's analysis is clear and correct in holding that Clemons represents new law in that is not available to petitioner in a federal post-conviction setting. The opinion of the court below correctly applies the constitutional standard to the question at hand. Sawyer v. Smith, 497 U.S. ___, 110 S.Ct. 2822, 109 L.Ed.2d 193 (1990); Saffle v. Parks, 494 U.S. ___, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); Butler v. McKeller, 494 U.S. ___, 101 S.Ct. 1212, 108 L.Ed.2d 347 (1990). A look at the opinion of the Fifth Circuit will be helpful as it would be hard to embellish on the excellent analysis found there. After looking at the opinion in Clemons, the court below held:

Saffle's reading of Lockett and Eddings stressed that "[t]here is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision, and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision," and noted that rules regarding "how [the jury] must consider the mitigating evidence" were not within the ambit of those cases. ___ U.S. at ___, 110 S.Ct. at 1261; see also Sawyer v. Smith, ___ U.S. ___, ___, 110 S.Ct. 2822, 2828, 111 L.Ed.2d ___ 193 (1990) ("general proposition[s]" divined from Lockett and Eddings insufficiently determinative for Teague test, aff'g Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989) (en banc). Mississippi's practice neither addresses what factors the jury may consider, nor, in fact, any consideration by the jury at all; the jury in Smith's case, per instance, was free to consider any statutory or non statutory mitigating evidence it chose. Mississippi has simply developed a practice as one component of its review process that ignores invalid aggravating circumstances for the sake of valid ones.

Not until Clemons v. Mississippi did the United States Supreme Court specifically apply Godfrey and Maynard to the Mississippi aggravating circumstance, and before that application it could at least be said that the constitutional practice of Mississippi's redemptive status was ambiguous, making reasonable for Teague purposes the rule preceding Clemons. See Butler, ___ U.S. at ___, 110 S.Ct. at 1217; Saffle, ___ U.S. at ___, 110 S.Ct. at 1260-61. In Evans v. Thigpen, 809 F.2d 239, 241 (5th Cir.) (dicta), cert. denied, 483 U.S. 1033, 107 S.Ct. 3278, 97 L.Ed.2d 782 (1987), Edwards v. Scroggy, 849 F.2d 204, 211 n.7 (5th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1328, 103 L.Ed.2d 597 (1989), and most recently in Stringer v. Jackson, 862 F.2d 1108, 1113-15 (5th Cir. 1990), which the Supreme Court has vacated and remanded for consideration in light of Clemons v. Mississippi, see ___ U.S. ___, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990), various panels of this court have sustained death sentences premised in part on an invalid aggravating circumstance by recognizing the Mississippi practice of sustaining verdicts when supported by at least one valid aggravating circumstance. Under this practice, perhaps first represented in Evans v. State, 422 So.2d 737, 743 (Miss. 1982), cert. denied, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 314 (1983), the Mississippi Supreme Court typically would recognize the problematic constitutionality of the "especially heinous, atrocious, or cruel" aggravating circumstance, possibly review the sentence for proportionality and under the Coleman limiting construction of the circumstance, and uphold the sentence if in any event the jury had found at least one other valid aggravating circumstance. See, e.g., Pinkney v. State, 538 So.2d 329, 355-58 (Miss. 1988), vacated and remanded for further consideration in light of Clemons v. Mississippi, ___ U.S. ___, 110 S.Ct. 1800, 108 L.Ed. 931 (1990); Lanier v. State, 533 So.2d 473, 491 (Miss. 1988) (alternative holding; sentence vacated on other grounds); Lockett v. State, 517 So.2d 1317, 1336 (Miss. 1987) (alternative holding), cert. denied, 487 U.S. 1210, 108 S.Ct. 2858, 101

L.Ed.2d 895 (1988); **Johnson v. State**, 511 So.2d 1333, 1336-39 (Miss. 1987) (alternative) rev'd sub nom. **Johnson v. Mississippi**, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); **Stringer v. State**, 500 So.2d 928, 944-45 (Miss.1986); **Irving v. State**, 498 So.2d 305, 314 (Miss. 1986) (alternative holding), 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 826 (1987); **Edwards v. State**, 441 So.2d 84, 92 (Miss. 1983) (alternative holding; sentence vacated on divided opinion; **Tokman v. State**, 435 So.2d 664, 670 (Miss. 1984) (alternative holding), cert. denied, 467 U.S. 1256, 104 S.Ct. 3527, 82 L.Ed.(1984).

This practice relied in part on decisions of the Supreme Court subsequent to **Lockett** and **Eddings** (and subsequent by a matter of months to the point at which Smith's conviction became final) that might with hindsight be read as anticipating **Clemons**, but at the time might have appeared to confirm the constitutionality of the Mississippi practice. **Zant v. Stephens**, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), upheld a death sentence administered under the Georgia sentencing scheme when one of the three aggravating circumstances found by the jury was subsequently held invalid by the Georgia Supreme Court while the other two aggravating circumstances were specifically upheld. Although the opinion recognized the potential difference attending a "weighing" state, id. at 873 n.12, 890-91, 103 S.Ct. at 2741 n. 12, 2750, the chief import of the decision was often viewed as confirming the constitutional latitude afforded the common state practice of redeeming death sentences when more than one aggravating circumstance was present, and **Zant** was relied upon by this court and the Mississippi Supreme Court in warranting the Mississippi practice. See, e.g., **Stringer v. Jackson**, 862 F.2d at 113-14; **Lanier v. State**, 533 So.2d at 491; **Lockett v. State**, 517 So.2d at 1336; **Johnson v. State**, 511 So.2d at 1336-39; **Stringer v. State**, 500 So.2d at 944-45; **Irving v. State**, 498 So.2d at 314.¹⁶ Similarly, while the plurality opinion in **Barclay v. Florida**, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), might have suggested a reservation

regarding certain circumstances in "weighing" states, see id. at 954 n. 12, the opinion also noted that Florida, like Georgia, "requires the sentencer to find at least one valid aggravating circumstance before the death penalty may even be considered," id. at 954, 103 S.Ct. at 3427, and ultimately upheld the Florida scheme. Finally, **Maynard v. Cartwright** left to Oklahoma the redetermination of sentence and recognized the possibility that the court "would not necessarily set aside a death penalty where on appeal one of several aggravating circumstances has been found invalid or unsupported by the evidence." 486 U.S. at 365, 108 S.Ct. at 1860.

To the extent that these cases contain reservations distinguishing schemes like that administered by Mississippi, it cannot be said that such distinctions represented legal determinations that control the outcome of Smith's case, and certainly not so for the law applicable at the time his conviction became final. The Supreme Court explicitly acknowledged at a time prior to that date that it would not distinguish between functionally similar sentencing schemes, even if the differences would obviate the potential distinctions marking a "weighing" state. See **Franklin v. Lynaugh**, 487 U.S. 164, 108 S.Ct. 2320, 2331 n. 12, 101 L.Ed.2d 155 (1988) (citing **Adams v. Texas**, 448 U.S. 38, 46, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)); see also **Stringer v. Jackson**, 862 F.2d at 1115 (opining that there is "no difference, other than on in semantics, between instructing a jury to weigh aggravating against mitigating circumstances in determining the sentence in instructing a jury to consider all aggravating and mitigating circumstances in deciding on the sentence"). Of the large number of cases which have enforced a practice such as that of Mississippi, the majority have ignored fine distinctions among the various states' capital schemes. [Citations omitted.]

Rather than allowing the federal judiciary a means of reneging on its commitment to the proposition that there is no "one right way for a State to set up its

capital sentencing scheme," *Spaziano v. Florida*, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984), the *Teague* doctrine in part tolerates the diversity of state schemes by accepting the fact that various jurisdictions will not always correctly anticipate the ultimate constitutional significance of every detail. Instead, "reasonable, good-faith interpretations of existing precedents" are sufficient to prevent application of new law. *Butler* 110 S.Ct. at 1217; see also *Sawyer v. Smith*, ___ U.S. at ___, 110 S.Ct. at 2828-29 (incorrect characterization of Supreme Court precedent by Mississippi Supreme Court further indicates extent to which subsequent constitutional ruling was not dictated.) We hold, consequently, that the application of *Clemons* to *Smith* would involve the application of a "new rule" on collateral review, a practice normally barred by *Teague*.

¹⁶ *Butler's* observation regarding the retroactivity of judicial rhetoric is surely appropriate to any effort to locate the distinctions of *Clemons* in *Zant*. In *Johnson v. Mississippi*, for example, the Court stressed its "specific[] reli[ance]" in that case on the admissibility of evidence at the sentencing hearing, 486 U.S. 578, 590, n.9, 10 S.Ct. 1981 n. 9, 100 L.Ed.2d 575 (1988), a characterization of *Zant* that by itself might well warrant affirming *Smith's* sentence.

904 F.2d at 984-986.

Clearly, the Fifth Circuit applied the proper constitutional standard when analyzing whether or not *Clemons* represents new law. There was close adherence to the teachings of *Butler* and *Saffle*. The decision in *Clemons*, setting forth limitations on Mississippi's practice of supporting a death sentence on the basis of the remaining,

valid aggravating factors was not dictated by prior precedent of this Court.

Even though the question of whether or not *Clemons*, is new was answered in a manner against petitioner's position, that did not end the inquiry. As it was required to do, the Fifth Circuit continued its analysis to determine whether or not *Clemons* represented a decision that fell into one of the two exceptions to the application of *Teague v. Lane*, 489 U.S. ___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Since, the decision in *Clemons* would not decriminalize a class of conduct nor would it prohibit the imposition of capital punishment on a particular class of individuals the first exception would not have any application to *Stringer's* case. *Smith*, 904 F.2d at 986.

Looking to the second exception the Fifth Circuit held:

The second exception is for those rare "watershed rules of criminal procedure" which implicate the fundamental fairness and accuracy of the criminal proceeding. See *Saffle*, ___ U.S. at ___, 110 S.Ct. at 1263; *Butler*, 110 S.Ct. at 1218. As the en banc court noted in *Sawyer v. Butler*, 881 F.2d 1273, 1294 (5th Cir. 1989) (en banc), aff'd, sub nom. *Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990), this exception is tailored to those rules designed to redress constitutional violations which "so distort the judicial process as to leave one with the impression that there has been no judicial determination at all, or else skew the actual evidence crucial to the trier of fact; s disposition of the case," and does not include procedurally flawed contemplation or review of relevant evidence. As the Supreme Court recently observed in *Sawyer v. Smith*, "[a]ll of our Eighth Amendment jurisprudence concerning capital sentencing

is directed toward the enhancement of reliability and accuracy in some sense," but Teague's second exception is limited to "watershed" rules affecting "bedrock procedural elements." ___ U.S. at ___, 110 S.Ct. at 2931. The rule on which Smith would rely is not such exalted stature.

Because we conclude that a necessary component of Smith's claim that the use of the "especially heinous" aggravating circumstance in his sentencing phase was barred by Teague, we do not consider whether that claim has been procedurally barred or has merit.

904 F.2d at 986-987.42

This analysis is correct. In Clemons, the Court stated that on remand the Mississippi Supreme Court could preform a reweighing of the aggravating and mitigating circumstances or it could perform a "harmless error analysis" and affirm a death sentence in the fact of an invalid aggravating circumstance. The fact that the appellate court is allowed to perform a harmless error analysis to a Clemons error demonstrates that it is not the "watershed" or "bedrock procedural elements" spoken of in Teague. The Court has usually cited Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) as an example of the type rule that comes within this exception. It cannot be said that Clemons or Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) either one come within this exception.

Petitioner, in a supplemental brief, further contends that Parker v. Dugger, ___ U.S. ___, 59 U.S.L.W. 4082 (January 22, 1991), represents the retroactive application of Clemons to a

case on federal post-conviction review. The simple answer to this claim is that the bar found in Teague, was never interposed as a defense by the State of Florida in Parker. Collins v. Youngblood, 497 U.S. ___, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) makes clear that Teague is not jurisdictional and a court need not raise the Teague bar on its own motion. While there is no requirement that a court raise Teague non-retroactivity, there is no prohibition to it doing so. Therefore, since Teague was never interposed as a bar to applying Clemons retroactively, Parker, does not represent a case that is dispositive of this case. It has no effect on the decision of the Fifth Circuit holding that Clemons will not to be retroactively applied to cases pending on federal post-conviction review.

Youngblood, is also grounds for allowing this claim to be raised on remand. If a court may raise the claim sua sponte it may allow the defense to be raised at this stage of the proceedings. Petitioner contends that respondent intentionally waived the point when it did not raise Teague in the response to the supplemental brief filed in the first petition for writ of certiorari. We would point out that the Clemons issue was not the subject of the supplemental brief filed by petitioner. The issue raised in the supplemental brief was a claim under the Mills/McKoy precedent. It is hardly appropriate to respond to a claim that is not raised in a supplemental response. Therefore, respondent would

submit that it never waived the claim and that the Fifth Circuit was not in error in allowing the defense to be raised.

Petitioner claims that there is a conflict among the circuits as to the retroactivity of Maynard, as the court below held in Smith v. Black, 904 F.2d 983 n. 14, it is not necessary to determine the application of Maynard to this case. Therefore, while there may be a split among the circuits on this issue the court below did not base its decision on this ground in reinstating the denial of habeas. This is not ground for granting certiorari. Further, petitioner has not shown that there is a conflict among the circuits as to whether or not Clemons is to be applied retroactively.

Petitioner also contends that the Fifth Circuit ignored the mandate of this Court when it did not consider the merits of the claim relating to the "especially heinous" aggravating factor in light of Clemons. Nothing could be further from the truth. The Fifth Circuit considered the claim in light of Clemons and came to the conclusion that Clemons did not apply to the case.

II. Where the State Supreme Court held the claim relating to the "especially heinous" aggravating circumstance to be procedurally barred and this bar was recognized by the United States District Court, the fact that the Court of Appeals addresses the merits of the claim does not waive the bar. The claim remains procedurally barred and therefore certiorari should be denied.

Petitioner next contends that the Fifth Circuit was erred in affirming the denial of habeas relief because of the decision in Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). His reasoning is that since the state court never invoked a harmless error rule in this case the decision is in some way ambiguous. Therefore, the Fifth Circuit could not affirm using a harmless error rule. Petitioner attempts to compare apples and oranges. Harris is used to when a state court's ruling is ambiguous as to whether the issue was decided on state law or federal grounds. It has no application when there is no alternative ground for affirmance given by the state court. There is no ambiguity in the state court's resolution of the issue. The claim was procedurally barred without resort to an alternative ruling. Harris has no application to the actions of a federal court of appeals considering a claim on habeas corpus. Respondent would submit that this claim is procedurally barred.

The State raised the procedural bar before the state court in response to this claim being presented in the state post-conviction petition. The Mississippi Supreme Court imposed a

procedural bar as to the claim. Stringer v. State, 485 So.2d at 275. The state again relied on the procedural default before the district court in response to this issue. Looking to the opinion of the District Court concerning this matter we find the following:

The next issue raised by Petitioner is that the jury's finding of the heinous, cruel and atrocious aggravating circumstances resulted in an arbitrarily imposed sentence. At the outset, the Court notes that this claim is procedurally barred. Stringer, 485 So.2d at 275. Even if this claim were not procedurally barred it is without merit. See Johnson v. Thigpen, 806 F.2d 1243, 1245-49 (5th Cir. 1986).

Stringer v. Scroggy, 675 F.Supp. at 366.

In the brief to the court below the respondent relied on the procedural bar imposed by the state court and recognized by the district court as its answer to this claim.

When the court of appeals considered petitioner's appeal it stated "[b]ecause each of Stringer's points of error is either procedurally barred or without merit, we affirm the district court's denial of the writ." Stringer v. Jackson, 862 F.2d at 111. However, the Fifth Circuit alternatively addressed the merits of the claim without specifically mentioning the bar imposed by the state court or the district court in the discussion of this issue. We submit that the discussion of the merits by the Court below does not invalidate the imposition of the procedural bar. What we have here if anything is an ambiguous ruling by the court of appeals on the issue that can quickly be resolved by looking to the district courts resolution of the issue.

As we pointed out in the court below, appellant had the tools to make the claim at the time of trial and on direct appeal, therefore he cannot be excused from the application of the procedural bar. Therefore even if the Fifth Circuit was in error in its analysis of the merits of this claim, which it was not, the issue is procedurally barred. This Court held in Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982):

We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not ensue that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default. [Emphasis added.]

71 L.Ed.2d at 804.

See: Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); Clanton v. Muncy, 845 F.2d 1238 (4th Cir. 1988). This exact claim has been being raised by defense counsel in Mississippi since the enactment of the statutory death penalty scheme. In Washington v. State, 361 So.2d 61 (Miss. 1978); Coleman v. State, 378 So.2d 640 (Miss. 1979); Evans v. State, 422 So.2d 737 (Miss. 1982), Irving v. State, 441 So.2d 846 (Miss. 1983); Edwards v. State, 441 So.2d 84 (Miss. 1983), all cases decided prior to the trial or appeal of the case at bar this claim was raised. This

exact claim had also been litigated by a Mississippi defendant in the federal courts prior to the time of trial or appeal. Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), cert. denied, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983). It is clear that the tools to make the objection to the use of the "especially heinous, atrocious or cruel" aggravating circumstance existed at the time of trial and direct appeal. No claim was raised and the State court made a "plain statement" that the refusal to consider this claim rested on an adequate and independent state procedural rule. Harris. The claim is barred from consideration by the federal courts because petitioner has not shown cause or prejudice to overcome the procedural bar. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The claim remains barred.

While the Fifth Circuit may have made a harmless error analysis as an alternative ruling in this case it is not controlling. The procedural bar is the controlling ruling here. Harris, has no application to this case.

CONCLUSION

For the above and foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

BY: 

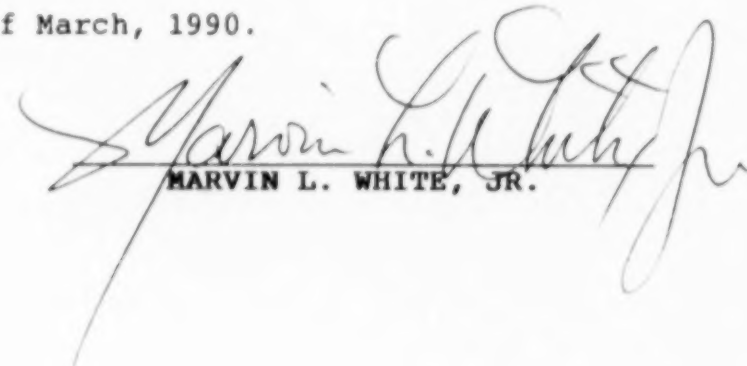
Office of the Attorney General
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CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above Brief in Opposition to the following:

Kenneth J. Rose, Esquire
Post Office Box 510
Jackson, Mississippi 39205

This the 8th day of March, 1990.


MARVIN L. WHITE, JR.

STATE OF MISSISSIPPI



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MIKE MOORE
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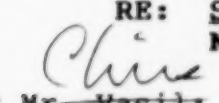
MAR 11 1991

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March 8, 1991

Honorable Chris Vasil, Deputy Clerk
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Washington, D.C. 20543

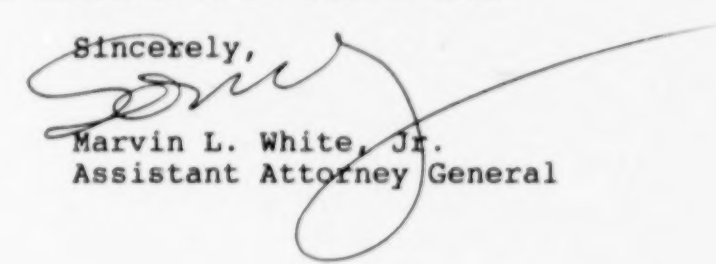
RE: Stringer v. Black
No. 90-6616


Dear Mr. Vasil:

Please find enclosed for docketing and filing in the above captioned cause the original and ten copies of the Brief In Opposition.

Thank you for your assistance in this matter.

Sincerely,


Marvin L. White, Jr.
Assistant Attorney General

MLW/dsm

Enclosures

cc: Honorable Kenneth J. Rose

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ORIGINAL

No. 90-6616

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

Supreme Court, U.S.
FILED

MAR 13 1991

OFFICE OF THE CLERK

JAMES R. STRINGER

PETITIONER

VS.

LEE ROY BLACK, Commissioner
Mississippi Department of Corrections,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RECEIVED

MAR 20 1991

OFFICE OF THE CLERK
SUPREME COURT, U.S.

REPLY TO THE STATE'S BRIEF IN OPPOSITION

Petitioner, James R. Stringer, respectfully replies to the State's Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, as follows:

The posture of this case is the same as Parker v. Dugger, ___ U.S. ___, 111 S.Ct. 731 (January 22, 1991) which, in the context of habeas corpus review, held unconstitutional the Florida Supreme Court's affirmance of Parker's death sentence without considering the mitigating circumstances in light of two invalid aggravating circumstances. Parker depends on the Eighth Amendment jurisprudence stressing the importance of individualized consideration in capital cases, characterized most recently by this Court in Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441 (1990). Parker and Clemons restate the fundamental principle that an appellate court may not reinstate a death sentence in light of

a factor which invalidates the decision by the original sentencer, without "an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983).

This reasoning requires that Mr. Stringer's death sentence also be reversed. As the Court explained in Teague v. Lane, ___ U.S. ___, 109 S.Ct. 1060, 1069 (1989), "once a new rule is applied to the defendant in the case announcing the new rule, even-handed justice requires that it be applied retroactively to all who are similarly situated." For this reason, the Court addresses retroactivity of decisions as a threshold issue. Teague v. Lane, 109 S.Ct. at 1069. New rules will not be "applied or announced in cases on collateral review." Penry v. Lynaugh, 109 S.Ct. 2934, 2944 (1989). Therefore, the apparent explanation for this Court's decision in Parker is that no new rule was announced in Clemons or Parker.

Respondent argues that the State of Mississippi, unlike the State of Florida in Parker, interposed a timely defense that Clemons v. Mississippi should be held nonretroactive to cases pending in post-conviction proceedings. State's Brief in Opposition at 18. This attempt to distinguish Parker relies on a mistaken view of the record. According to the State:

Petitioner contends that respondent intentionally waived the point when it did not raise Teague in the response to the supplemental brief filed by petitioner. We would point out that the Clemons issue was not the subject of the supplemental brief filed by petitioner. The issue raised in the supplemental brief was a claim under the Mills/McKoy precedent. It is hardly appropriate

to respond to a claim that is not raised in a supplemental response. Therefore, respondent would submit that it never waived the claim and that the Fifth Circuit was not in error in allowing the defense to be raised.

Brief in Opposition at p. 18-19. To the contrary, James Stringer addressed the application of this Court's decision in Clemons as the leading issue in his Supplemental Brief in Support of Granting Certiorari, filed on April 5, 1990 in Stringer v. Black, No. 88-7000. The State's Supplemental Brief to this Court addressed and relied on Clemons, but did not raise the defense of the nonretroactivity of that decision. Consequently, assuming arguendo that this Court did not address the retroactivity of the "new rule" announced in Clemons and Parker because the State of Florida did not raise this defense, the same reasoning and holding apply to James Stringer.

The State argues that the constitutional challenge to the "heinous, atrocious, or cruel" aggravating circumstance has been waived in the state courts. This argument was rejected twice without comment by the court below. The State's assertion that the Fifth Circuit ruling is based in the alternative on the acknowledgement of a valid state procedural bar is unsupported by the opinions of the majority and the opinion of the dissent in the court below. Stringer v. Jackson, 862 F.2d 1108, 1113-1115, 1119-1126 (5th Cir. 1988); Stringer v. Black, 909 F.2d 111 (5th Cir. 1990). The obvious reason for the Fifth Circuit's rejection of a procedural bar is that the state court did not procedurally bar this issue.

The State's discussion of the procedural history of this case at pages 2-9 of the Brief in Opposition mischaracterizes the opinions by the state courts and leaves some substantial gaps which explain why the Mississippi courts did not invoke a procedural bar. The State does not mention that the Mississippi Supreme Court reviewed the "especially heinous, atrocious, or cruel" aggravating circumstance during direct appeal proceedings as part of its statutory review.¹ Stringer v. State, 454 So.2d 468, 479 (Miss. 1984). The State also omits that James Stringer, in his petition for rehearing on direct appeal, specifically challenged the vague application of the "especially heinous, atrocious or cruel" aggravating circumstance relying upon Godfrey v. Georgia, 446 U.S. 420 (1980). While the State's Brief (p. 5) chronicles the modification of the direct appeal opinion as a result of the petition for rehearing, it fails to observe that the Mississippi Supreme Court did not procedurally bar the Eighth Amendment challenge to this aggravating circumstance. Finally, the State's claim (State's Brief at p. 23) that the Mississippi Supreme Court made a "plain statement" invoking a state procedural bar of this particular issue in post-conviction proceedings is simply wrong. Stringer v. State, 485 So.2d 274, 275 (Miss. 1986).

¹ The Mississippi Supreme Court has invoked its statutory role pursuant to Miss. Code Ann. Sections 99-19-105 to review the constitutionality of the "especially heinous, atrocious or cruel" aggravating circumstance even where the aggravating circumstance was not specifically challenged at trial or on appeal. See, e.g., Clemons v. State, 535 So.2d 1354, 1362 (Miss. 1988); Pinkney v. State, 538 So.2d 329, 355 (Miss. 1988).

The State either misunderstands or fails to address Issues I and II of James Stringer's Petition for Writ of Certiorari. The State admits that the state court never invoked a state automatic affirmance rule, but gives no reason why the "plain statement" rule of Long and Harris should not apply in these circumstances.² Brief in Opposition at p.20. Furthermore, the State gives no reason why this Court's determination in Clemons that a rule of automatic affirmance did not clearly or uniformly apply in Mississippi should not bind the Court of Appeals for the Fifth Circuit.

Wherefore, premises considered, James Stringer respectfully requests the Court to grant the writ of certiorari, and either summarily reverse the decision by the Court of Appeals and grant the writ of habeas corpus, or vacate the judgment of the Court below and remand for further consideration in light of Parker v. Dugger, ___ U.S. ___, 111 S.Ct. 731 (1991).

Respectfully submitted,


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² This Court has already found that a state harmless error rule is subject to the Long doctrine. Delaware v. Van Arsdale, 475 U.S. 673 (1986). The State makes no effort to distinguish Van Arsdale.

No. 88-7000
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 1988 TERM

JAMES R. STRINGER

Petitioner

VERSUS

LEE ROY BLACK, Commissioner,
Mississippi Department of Corrections

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION TO THE GRANTING OF CERTIORARI

COMES NOW the respondent by and through counsel and files this supplemental brief in opposition to the granting of certiorari. The recent spate of decisions in cases involving the death penalty requires this brief.

First we would further address the claim raised under Question I relating to the decision in Mills v. Maryland, 486 U.S. 367 (1988) and the more recent decision in McKoy v. North Carolina, ___ U.S. ___, 58 U.S.L.W. 4311 (March 5, 1990).

While we still maintain the claim is procedurally barred under the provisions of Wainwright v. Sykes, 433 U.S. 72 (1977) and Engle v. Isaac, 456 U.S. 107 (1982), we would further submit that the claim is barred under this Court's recent rulings in Teague v. Lane, 489 U.S. ___, 103 L.Ed.2d 334 (1989) and Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989) as amplified in

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing pleading was this date posted via first class mail, postage prepaid, to Hon. Marvin L. White, Jr., Assistant Attorney General, P.O. Box 220, Jackson, MS. 39205.

This the 18th day of March, 1991.


Kenneth J. Rose

Butler v. McKeller, ___ U.S. ___, 58 U.S.L.W. 4294 (March 5, 1990) and Saffle v. Parks, ___ U.S. ___, 58 U.S.L.W. 4322 (March 5, 1990). Clearly there should be no retroactive application of the ruling in Mills and the later decision in McCoy as they constitute new rules of law. Further, Mills/McKoy do not fall into the exceptions allowing retroactivity listed in Teague and Penry as the rule in Mills/McKoy would neither decriminalize a class of private conduct nor prohibit the imposition of capital punishment on a particular class of persons. Neither is the decision in Mills a "watershed rule of criminal procedure" that the second exception in Teague contemplates.

Petitioner's conviction became final on direct appeal when certiorari from the Mississippi Supreme Court was denied on February 19, 1985. Stringer v. Mississippi, 469 U.S. 1230 (1985). Mills was not decided until June 6, 1988 and McCoy on March 5, 1990.

Teague is a rule limiting the jurisdiction of the federal courts to entertain claims presented on habeas. A reading of Saffle and Butler leave little doubt that the rule in Mills/McKoy is new law. In Saffle and Butler we find instruction as to what type rulings will be applied retroactively. In Saffle the petitioner urged that an instruction given in the penalty phase of the trial, telling the jury to avoid any influence of sympathy, violated the Eighth Amendment. In reaching its decision that petitioner urged a "new rule" of law as a ground for reversal, the Court considered Lockett v. Ohio, and Eddings v.

Oklahoma, determining that neither spoke directly, if at all, to the issue presented here since Parks was asking the court to create a rule relating, not to what mitigating evidence the jury must be permitted to consider, but to how it must consider the mitigating evidence. Furthermore, the Court refused to find assistance in California v. Brown, 479 U.S. 538 (1987),¹ since a reasonable juror would interpret the instruction to ignore mere sympathy "as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence." It was not unconstitutional for a state to expect a reasoned moral response and prohibit juries from basing their decisions on factors not present at trial. Saffle, 489 U.S. at ___, 58 U.S.L.W. 4324.

Further explaining the definition of a "new rule" in Butler, the Court declared that the rule of Arizona v. Roberson 486 U.S. 675 (1988), is a "new rule" of law since its result was not dictated by precedent existing at the time defendant's conviction became final. It rejected the argument that Edwards v. Arizona, 451 U.S. 477 (1981), dictated the result in Roberson since Roberson would be merely an extension of the prophylactic rule in Edwards which requires the police, during continuous custody, to refrain from all further questioning once an accused invokes his right to counsel until counsel is furnished. The rule in

¹ In Brown the court held that an instruction telling the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feelings," during the sentencing phase did not violate the Eighth Amendment.

Roberson, which extended the Edwards rule to the context of a separate investigation is a new rule of law and not applicable to Butler on collateral review. By analogy, the rule in Mills/McKoy condemning the unanimity requirement as it relates to mitigating circumstances was not predicted by prior federal cases.

Addressing the effect of language used by court's in deciding cases the opinion Butler reads:

But the fact that a court says that its decisions within the "logical compass" of another decision, or indeed that it is "controlled" by prior decision, is not conclusive for the purposes of deciding whether the current decision is a "new rule" under Teague. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions—even when aware of reasonable contrary conclusions reached by other courts. In Roberson, for instance, the Court found Edwards controlling but acknowledged a significant difference opinion on the part of several lower courts that had considered the question previously. 486 U.S., at 679, n. 3. That the outcome in Roberson was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits noted previously. It would not have been an illogical or even a grudging application of Edwards to decide that it did not extend to the facts of Roberson. We hold, therefore, that Roberson announced a "new rule."

58 U.S.L.W. at 4297.

The Court, in reaching its conclusions in Butler and Saffle, relied heavily on the law prevailing at the time that the petitioner's conviction became final. As Justice Brennan said in his dissent in Butler, in regard to adjudicating the claim by reference to the prevailing law at the time of the conviction, "rather, such adjudication requires a judge to evaluate both the content of previously enunciated legal rules and the breath of

their application. A judge must thereby discern whether the principles applied to specific patterns in prior cases fairly extend to govern analogous factual patterns." Butler, 58 U.S.L.W. at 4299. In reviewing petitioner's claims under the prevailing law at the time that his conviction became final, it is clear that the principles regarding a death penalty hearing at that time, when applied to the specific facts of this case, did not predict the outcome of Mills/McKoy.

Finally, we must look to see whether or not the "new rule" of Mills/McKoy fall into one of the two exceptions set forth in Teague. The Court held in Perry and repeated in Saffle that a new rule of constitutional law will not be applied in cases on collateral review unless the rule comes within one of the two narrow exceptions. This limitation on the proper exercise of habeas corpus jurisdiction applies to capital and non-capital cases. Since petitioner's capital conviction became final before Mills was decided in 1988, this claim is barred from consideration by this Court by the jurisdictional bar of Teague.

Clearly petitioner cannot make use of the first exception to the applicability of a "new rule". The first exception permits the retroactive application of a "new rule" if the rule places a class of private conduct beyond the power of the state to proscribe, Teague, 103 L.Ed.2d at 356, or addresses a "substantive categorical guarantee accorded by the constitution," such as a rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense."

Penry, 106 L.Ed.2d at 285; Saffle, 58 U.S.L.W. at 4324-4325. Since petitioner can not contend that the conduct for which he was charged is constitutionally privileged, or that he is among a class of persons protected against the death penalty, his Mills/McKoy claim does not qualify for the first exception under Teague.

The second exception is for "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of criminal proceedings. Butler, 58 U.S.L.W. at 4297; Saffle, 58 U.S.L.W. at 4325. The objectives of fairness and accuracy are central to the theme of "watershed rules". Stated another way, "watershed rules" are those rules that are essential to obtaining a reliable verdict that guarantees the fairness and accuracy of the proceeding. In considering which rules would be "watershed rules", the Court held:

[W]e are also of the view that such rules are 'best illustrated by recalling the classic grounds from the issuance of writ of habeas corpus--that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods.' Rose v. Lundy, [cite omitted].

Teague, 103 L.Ed.2d at 358.

In Saffle, we get further guidance as to the application of the second exception by the following:

Although the precise contours of this exception may be difficult to discern, we have usually cited Gideon v. Wainwright, 372 U.S. 335 (1963), holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception. . . . Whatever one may think of the importance of

respondent's proposed rule, it has none of the primacy and centrality of the rule adopted in Gideon or other rules which may be thought to be within the exception.

58 U.S.L.W. at 4325.

The rule set forth in Mills/McKoy does not fall into the category of a "watershed rule". Therefore, there can be no retroactive application of this rule by this Court.²

Petitioner makes no attempt in his motion to demonstrate why Mills and McKoy are not new law other than to state that the Court's opinion "indicated that its decision was dictated by its unbroken line of precedent." Butler teaches us that such language cannot be relied upon in making the Teague analysis. It is clear that never before the decision in Mills was there any indication that the States were not free to require that the jurors must find mitigating circumstances unanimously before considering that circumstance. The fact that two states read into the capital punishment literature that this was allowable is

² It is interesting to note the dissent from the granting of certiorari in McNeil v. North Carolina, No. 88-7081 for reconsideration in light of McKoy. The four dissenters stated: On remand, the North Carolina Supreme Court remains free to consider these facts, or any others that may affect the determination whether our opinion in McKoy requires alteration of its judgment. Similarly, incases where there is a question of procedural default, e.g., Artie v. North Carolina, 494 U.S. ____ (1990) (No. 89-6526), or where a unanimity requirement may have been harmless due to failure to present mitigating evidence, e.g., Hunt v. North Carolina, 494 U.S. ____ (1990) (No. 88-6684); Laws v. North Carolina, 494 U.S. ____ (1990) (No. 89-5837), these issues remain open for examination on remand.

Slip opinion attached as Exhibit A.

sufficient under the Butler analysis to show that this is new law.

Mills/McKoy represents a new rule under Teague therefore this Court has no jurisdiction to consider any claim under that ruling. While we submit that the claim procedurally barred under Sykes, we raise and address this additional bar so that the Court may be assisted in the exercise of its discretionary certiorari jurisdiction.

The claim raised under Question II of the petition involved the alleged invalidity of the "especially heinous, atrocious or cruel" aggravating circumstance in this case. We still maintain, as we did in our Brief in Opposition, that this claim was held to be procedurally barred by the district court and the court below, therefore the court has no jurisdiction to consider the claim. We do note that any question of the constitutionality of an appellate court affirming a sentence of death after finding an invalid aggravating circumstance has been resolved by the decision in Clemons v. Mississippi, ___ U.S. ___ (March 28, 1990). No constitutional infirmity exist in an appellate court performing a reweighing or harmless error analysis and affirming the sentence in the face of an invalid aggravating circumstance.

Finally, while the claim here is clearly barred, the argument under Question III claiming that the constitution requires the jury be told that it can return a life sentence even if the aggravating circumstances outweigh the mitigating circumstances or that they do not have to find any mitigating

circumstances to return a life sentence is clearly controlled by Boyde v. California, ___ U.S. ___, 58 U.S.L.W. 4301 (March 5, 1990) and Blystone v. Pennsylvania, ___ U.S. ___, 58 U.S.L.W. 4274 (February 28, 1990), no such instruction must be given.

Since the claims are all procedurally barred from consideration under Sykes and/or Teague certiorari should be denied.

Respectfully submitted,

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STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

CHARLENE R. PIERCE
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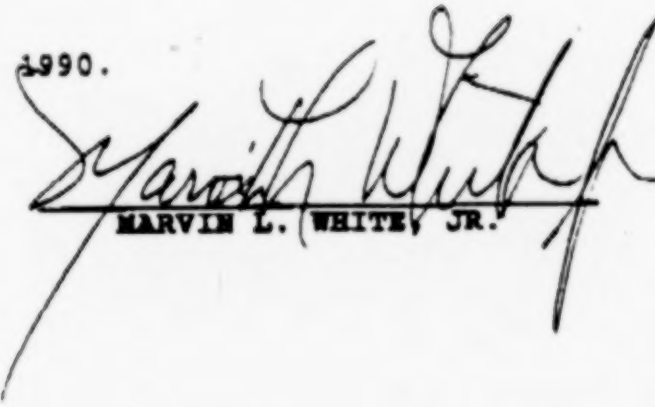
CERTIFICATE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing SUPPLEMENTAL BRIEF IN OPPOSITION TO THE GRANTING OF CERTIORARI to the following:

James E. Ostgard, Esquire
1625 Park Avenue
Minneapolis, Minnesota 55404

Kenneth J. Rose, Esquire
300 W. Markham
Durham, N.C. 27701

This the 29th day of March, 1990.


MARVIN L. WHITE, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

WILLIAM L. WILEY

PETITIONER

VERSUS

CIVIL ACTION NO. DC88-132-B-O

STEVE W. PUCKETT, SUPERINTENDENT,
MISSISSIPPI STATE PENITENTIARY, ET AL

RESPONDENTS

RESPONDENT'S MEMORANDUM IN SUPPORT OF
ANSWER AND RETURN TO PETITION FOR
WRIT OF HABEAS CORPUS

COMES NOW the respondent in the above-styled and numbered matter and files this memorandum in support of the answer and return to the petition for writ of habeas corpus filed herein. Petitioner is lawfully in the custody of Steve W. Puckett, Superintendent of the Mississippi State Penitentiary, under a sentence of death after having been convicted in the Circuit Court of DeSoto County, Mississippi for the crime of capital murder. During the Special September, 1981 Term of the Circuit Court of DeSoto County, Mississippi, the Grand Jury indicted petitioner for capital murder. The indictment grew out of the August 22, 1981 murder of Mr. J. B. Turner. The petitioner was tried in February, 1982 before a properly empaneled jury and after hearing evidence and deliberating thereon, the jury returned a verdict of guilty of capital murder. In a separate hearing, he was sentenced to death. On appeal of those findings, the Mississippi Supreme Court unanimously affirmed the conviction of guilt, but reversed the original death

Petitioner's direct appeal was final October 14, 1986 when the United States Supreme Court denied his petition for certiorari. His attempt to rely on Maynard, decided June 6, 1988, therefore requires a Teague analysis. If Maynard announced a new rule, petitioner will not be able to rely on the retroactive application of Maynard to his claim unless the rule falls into one of the two exceptions outlined above. In Teague, Justice O'Connor found that it was difficult to determine when a new rule was announced, but:

In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government....To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.

103 L.Ed.2d at 349 (citations omitted, emphasis in original).

A review of Maynard leads to the conclusion that no new rule was established by that case. The Supreme Court in Maynard stated: "We think the Court of Appeals was quite right in holding that Godfrey controls this case." 100 L.Ed.2d at 382. As the precedent of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), controlled or "dictated" the holding in Maynard, no new rule was created and Teague does not intervene to bar this Court's review of petitioner's claim.

Respondent would next point out that Mississippi law does not require the element of torture to be present in a crime for the heinous, atrocious or cruel aggravating circumstance to apply. Pinkney v. State, 538 So.2d 329 (Miss.1988). We would

issues which are barred on this Court's habeas review. Petitioner has not shown cause and prejudice to overcome these bars, thus, any procedural default in state court proceedings is not prejudicial to petitioner. There is no merit to this subclaim.

The record reveals that the acts at issue in this claim of ineffective assistance by counsel at the sentencing phase were either sound strategy or not errors. Furthermore, there has been no showing that but for these acts, the result of the proceeding, the sentence of death, would have been different. Petitioner is not entitled to an evidentiary hearing. Trial counsel's performance was effective and there was no prejudice to petitioner. As neither prong of the Strickland test has been satisfied, petitioner's claim here is without merit.

CONCLUSION

Respondent submits that there is no need for an evidentiary hearing as petitioner has had an opportunity for a full and fair hearing of the constitutional claims that he presents. There are no factual conflicts that are required to be decided that cannot be decided from the record now before the Court.

WHEREFORE, PREMISES CONSIDERED, respondent would respectfully submit that the petition for writ of habeas corpus in this case be denied, the stay of execution entered herein be vacated, and any application for certificate of probable cause

be denied in order that the lawful sentence of death imposed by the Circuit Court of DeSoto County can be carried out.

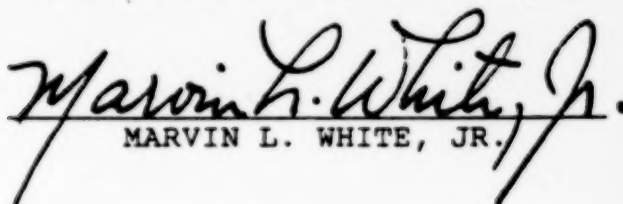
Respectfully submitted,

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL

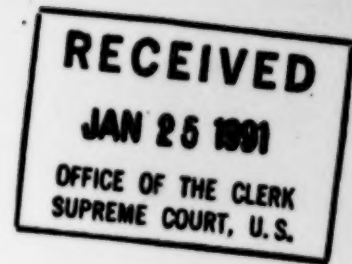
CHARLENE R. PIERCE
SPECIAL ASSISTANT ATTORNEY GENERAL

BY:


MARVIN L. WHITE, JR.

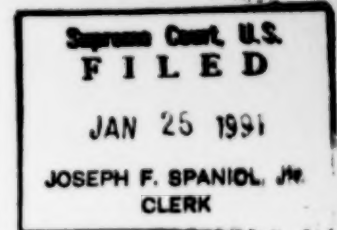
Office of the Attorney General
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

ORIGINAL



January 24, 1991

Kenneth J. Rose
923 Carolina Ave.
Durham, N.C. 27705



Honorable Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
One First Street, Northeast
Washington, D.C. 20453

Re: Stringer v. Black, No. 90-6616

Dear Mr. Spaniol:

Please find enclosed for filing Petitioner's
Supplemental Brief in Support of Petition for Writ of
Certiorari.

Thank you for your assistance in this matter.

Very truly yours,



Kenneth J. Rose
Counsel for James R. Stringer

Encl.

cc: Hon. Marvin L. White, Jr.

4 PM

No. 90-6616
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JAMES R. STRINGER Petitioner

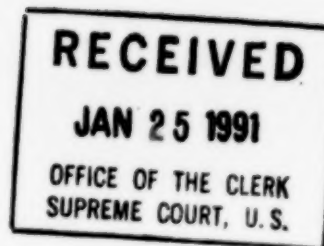
v.

LEE ROY BLACK, Commissioner
Mississippi Department of Corrections, Respondent

**SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

James R. Stringer files this supplemental brief in support of his petition for writ of certiorari pursuant to Rule 15.7 of the Rules of the United States Supreme Court in light of this Court's decision in Parker v. Dugger, No. 89-5961 (January 22, 1991). This decision relates to Issue III(b) of the Petition for Writ of Certiorari which argues that the court below erred by refusing to apply Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441 (1990) retroactively.

In Parker, this Court specifically applied Clemons to a habeas case to invalidate a death sentence which became final before Clemons. In Parker, two aggravating circumstances were invalidated by the Florida Supreme Court. However, that court neither applied a "harmless error" analysis, nor did it "reweigh" the remaining valid aggravators against mitigation, Parker v. State, 458 So.2d 750 (Fla. 1984). This Court granted certiorari after Parker was denied habeas relief by the Eleventh Circuit. The Court stated, "Following Clemons, a reviewing court is not compelled to remand. It may instead reweigh the evidence or conduct a harmless error analysis based on what the sentencer actually found. What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record. . . ." Parker, slip op. at 11. "After striking two aggravating circumstances, the Florida Supreme Court affirmed Parker's death sentence without considering the mitigating circumstances.




This affirmance was invalid because it deprived Parker of the individualized treatment to which he is entitled under the Constitution. See Clemons, supra at ___. "Parker, slip op. at 14.

Parker demonstrates that Clemons v. Mississippi applies retroactively to James Stringer's case.

This being so, this case should be remanded for further consideration. Given the applicability of Clemons, it is unclear whether the Fifth Circuit would hold Maynard v. Cartwright, 486 U.S. 356 (1988), standing alone, nonretroactive to James Stringer's case. Stringer v. Jackson, 909 F.2d 111 (5th Cir. 1990). The Fifth Circuit panel in this case considered Clemons and Cartwright as a unit for purposes of determining retroactivity. Id. Indeed, the case upon which the Stringer panel relies, Smith v. Black, 904 F.2d 950 (5th Cir. 1990), leaves the question of the retroactivity of Cartwright open. See also Hill v. Black, 920 F.2d 249 (5th Cir. December 14, 1990) (relying on Smith for the proposition that Clemons was nonretroactive, without reaching the question of whether Cartwright was nonretroactive to cases in post-conviction proceedings.)

Wherefore, premises considered, James Stringer's sentence of death should be remanded for further consideration in light of Parker v. Dugger.



Kenneth J. Rose
923 Carolina Ave.
Durham, N.C. 27705
(919)286-7653

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Supplemental Brief in Support of Petition for Writ of Certiorari was this date posted via first class mail, postage prepaid, to:

Marvin L. White, Jr.
Assistant Attorney General
P.O. Box 220
Jackson, MS. 39202
(601) 359-3680

This the 24th day of January, 1991.


Kenneth J. Rose

JUL 15 1991

OFFICE OF THE CL

No. 90-6616

In The
Supreme Court of the United States
October Term, 1991

JAMES R. STRINGER,

Petitioner,

vs.

LEE ROY BLACK, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF
CORRECTIONS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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*Counsel of Record

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Counsel for Respondent

Petition For Certiorari Filed December 24, 1990
Certiorari Granted May 13, 1991

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SUPREME COURT, U.S.

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IN THE CIRCUIT COURT OF
HINDS COUNTY, MISSISSIPPI

Hinds County Circuit Court No. U-337

Date	Entry
7/9/82	INDICTMENT
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9/20/82	TRIAL
9/27/82	GUILTY VERDICT
9/27/82	SENTENCING VERDICT
10/4/82	MOTION FOR NEW TRIAL
10/15/82	MOTION FOR NEW TRIAL DENIED

IN THE SUPREME COURT OF MISSISSIPPI

DP-33

Date	Entry
6/8/83	APPEAL BRIEF FOR THE APPELLANT
6/8/83	ABSTRACT OF RECORD

10/14/83 APPEAL BRIEF FOR THE APPELLEE
 1/26/84 ARGUED AND SUBMITTED
 7/11/84 DECISION OF SUPREME COURT OF MISSISSIPPI
 7/24/84 PETITION FOR REHEARING FILED
 7/24/84 BRIEF IN SUPPORT OF PETITION FOR REHEARING FILED
 8/15/84 PETITION FOR REHEARING DENIED AND ORIGINAL OPINION MODIFIED
 2/26/85 CERTIFIED COPY RECEIVED SHOWING CERTIORARI DENIED BY THE UNITED STATES SUPREME COURT ON 2/19/85
 6/17/85 APPLICATION FOR LEAVE TO FILE MOTION TO VACATE OR SET ASIDE JUDGMENT AND SENTENCE FILED
 6/18/85 BRIEF IN SUPPORT OF APPLICATION FILED
 10/24/85 RESPONSE TO APPLICATION FOR LEAVE TO FILE MOTION TO VACATE, ETC. FILED
 11/5/85 OPINION DENYING MOTION TO VACATE OR SET ASIDE JUDGMENT
 1/30/86 PETITION FOR REHEARING FILED
 4/9/86 PETITION FOR REHEARING DENIED

IN THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
 JACKSON DIVISION

J87-0015

Date	Entry
1-9-87	PETITION FOR WRIT OF HABEAS CORPUS FILED
1-9-87	APPLICATION TO PROCEED IN FORMA PAUPERIS FILED
1-9-87	APPLICATION FOR STAY OF EXECUTION FILED
1-12-87	ORDER GRANTING APPLICATION TO PROCEED IN FORMA PAUPERIS
1-12-87	ORDER GRANTING STAY OF EXECUTION
2-23-87	ANSWER AND RETURN OF RESPONDENT FILED
3-3-87	STATE COURT RECORD FILED
4-16-87	ORDER GRANTING EVIDENTIARY HEARING
4-24-87	ORDER GRANTING APPOINTMENT OF COUNSEL
7/29/87	PETITIONER'S MOTION TO AMEND PETITION FOR HABEAS CORPUS FILED
8/20/87	HEARING ON INEFFECTIVE ASSISTANCE OF COUNSEL
11/20/87	MEMORANDUM OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

11/30/87 PETITIONER'S MOTION TO ALTER OR
AMEND JUDGMENT FILED

1/22/88 MEMORANDUM OPINION AND ORDER
DENYING MOTION TO ALTER OR
AMEND JUDGMENT

2/19/88 NOTICE OF APPEAL FILED

2/19/88 PETITIONER'S APPLICATION FOR CER-
TIFICATE OF PROBABLE CAUSE FILED

2/22/88 ORDER GRANTING CERTIFICATE OF
PROBABLE CAUSE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-4126

Date	Entry
4/6/88	RECORD ON APPEAL FILED
5/26/88	BRIEF FOR APPELLANT FILED
7/26/88	BRIEF FOR APPELLEE FILED
8/15/88	REPLY BRIEF FOR APPELLANT
9/20/88	CASE ARGUED
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1/20/89	PETITION FOR REHEARING AND SUG- GESTION FOR REHEARING EN BANC DENIED

6/14/90 APPELLANT'S REMAND BRIEF

6/14/90 APPELLEE'S REMAND BRIEF

7/3/90 APPELLANT'S RESPONSE BRIEF

7/3/90 APPELLEE'S RESPONSE BRIEF

7/10/90 APPELLANT'S MOTION TO DEFER PRO-
CEEDINGS WITH MEMORANDUM FILED

7/19/90 RESPONSE TO MOTION TO DEFER PRO-
CEEDINGS FILED

7/26/90 ORDER DENYING APPELLANT'S
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REMAND

7/30/90 OPINION ON REMAND FROM THE
SUPREME COURT OF THE UNITED
STATES DENYING RELIEF

8/20/90 APPELLANT'S PETITION FOR
REHEARING FILED

9/10/90 PETITION FOR REHEARING AND SUG-
GESTION FOR REHEARING EN BANC
DENIED

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI NO. U-337

VS. Filed September 24, 1982

JAMES R. STRINGER

JURY INSTRUCTION NO. 11

The Court instructs the Jury that each person present at the time, and consenting to and encouraging the commission of a crime, and knowingly, wilfully and feloniously doing any act which is an ingredient to the crime, or immediately connected with it, or leading to its commission, is as much a principal as if he had with his own hand committed the whole offense; and if you believe from the evidence, beyond a reasonable doubt, that the Defendant, James R. Stringer, did wilfully, knowingly, unlawfully and feloniously do any act which is an ingredient of the crime of Capital Murder or immediately connected with it, or leading to its commission, then and in that event, you should find the Defendant guilty of Capital Murder.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

U-337

Filed September 23, 1982

(Caption Omitted In Printing)

JURY INSTRUCTION NO. 12

The Court instructs the Jury that in order for you to convict the Defendant of the crime of Capital Murder, you must find, beyond a reasonable doubt, from the evidence in this case, that on the 21st day of June, 1982, James R. Stringer wilfully, unlawfully and feloniously did attempt to take and carry away any personal property of Ray McWilliams, from his person, against his will, by violence to his person.

If the Jury first so finds, then it must, also, next find that on said date, while engaged in the commission of the aforesaid robbery of Ray McWilliams, if any, that the said Defendant, wilfully, unlawfully and feloniously, with or without malice aforethought, without authority of law, by any means or by any manner, with or without the premeditated and deliberate design to effect the death of Nell McWilliams, not in necessary self-defense, did then and there kill the said Nell McWilliams, a human being.

In the event that the Jury finds both of the above, beyond a reasonable doubt, from the evidence in this case, then and in that event the Defendant is guilty of Capital Murder, and the form of your verdict should be in the following form, written on a separate sheet of paper:

'We, the Jury, find the Defendant, James R. Stringer, guilty of Capital Murder.'

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

NO. U-337

Filed September 24, 1982

(Caption Omitted In Printing)

JURY INSTRUCTION NO. 14

The Court instructs the Jury that each person present at the time, and consenting to and encouraging the commission of a crime, and knowingly, wilfully and feloniously doing any act which is an ingredient to the crime, or immediately connected with it, or leading to its commission, is as much a principal as if he had with his own hand committed the whole offense; and if you believe from the evidence, beyond a reasonable doubt, that the Defendant, James R. Stringer, did wilfully, knowingly, unlawfully and feloniously do any act which is an ingredient of the crime of Murder or immediately connected with it, or leading to its commission, then and in that event, you should find the Defendant guilty of premeditated murder.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

Filed September 24, 1982

(Caption Omitted In Printing)

'We, the Jury, find the Defendant, James R. Stringer,
Guilty of Capitol [sic] Murder.'

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

NO. U-337

(Caption Omitted In Printing)

JURY INSTRUCTION NO. 18

You have found the defendant guilty of the crime of "Capital Murder". You must now decide whether the defendant will be sentenced to death or to life imprisonment. In reaching your decision, you must objectively consider the detailed circumstances of the offense for which the defendant was convicted, and the character and record of the defendant himself.

To return the death penalty, you must unanimously find from the evidence, beyond a reasonable doubt, that any aggravating circumstance(s) – those which tend to warrant the death penalty – outweigh the mitigating circumstance(s) – those which tend to warrant the less severe penalty of life imprisonment.

Consider only the following elements of aggravation in determining whether the death penalty should be imposed. Before you can return the death penalty in this case, you, the jury, must unanimously find from the evidence in this case, beyond a reasonable doubt, that one or more of the following aggravating circumstance(s) exist in this case:

1. The defendant contemplated that life would be taken and/or the capital murder was intentionally committed and the defendant shared in that intent, while the defendant was engaged in an attempt to commit a robbery; and was committed for pecuniary gain.

2. The capital murder was committed for the purpose of avoiding or preventing the detection and a lawful arrest of James R. Stringer, the defendant.

3. The capital murder was especially heinous [sic], atrocious or cruel.

If you so find, then you must proceed to weigh any such aggravating circumstance(s) against any existing mitigating circumstance(s) to determine whether the aggravating circumstance(s), if any, outweigh the mitigating circumstance(s), if any.

The Court instructs the Jury that mitigating circumstance(s) are those which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame.

The mitigating circumstance(s) which you may consider include the following:

1. The defendant has no significant history of prior criminal activity.

2. The age of the defendant at the time of the crime.

3. Any and all other matters, facts and circumstances, or combination of circumstances surrounding the defendant's life, character or record or any circumstance(s) of the offense brought before you during the trial of this cause which you, the Jury, deem to be mitigating on behalf of the defendant or which reasonably mitigates against imposition of the death penalty.

If you unanimously find from the evidence any one or more of the mitigating circumstance(s) listed above

exists, and, if after weighing the mitigating circumstance(s) and the aggravating circumstance(s), one against the other, you further find unanimously from the evidence beyond a reasonable doubt that the aggravating circumstance(s) outweigh the mitigating circumstance(s) and the death penalty should be imposed, your verdict shall be written on a separate sheet of paper, shall be signed by your foreman, and shall be in the following form:

"We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstance(s); (list the aggravating circumstance(s), if any, which you unanimously find beyond a reasonable doubt from those listed above in the same language as they are listed.) We, the Jury, further find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstance(s) and the aggravating circumstance(s), one against the other, that the aggravating circumstance(s) do outweigh the mitigating circumstance(s) and that the defendant should suffer the penalty of death."

/s/ Cecil C. Ferrell
Foreman of the Jury

If you fail to find any aggravating circumstance(s) unanimously and beyond a reasonable doubt, or, if you find unanimously and beyond a reasonable doubt, one or more aggravating circumstance, but after weighing the aggravating and mitigating circumstance(s), one against

the other, you fail to unanimously find, beyond a reasonable doubt, that the aggravating circumstance(s) outweigh the mitigating circumstance(s), then your verdict shall be in the following form:

"We, the Jury, find the defendant should be sentenced to imprisonment for life in the state penitentiary."

If, after reasonable deliberation, you cannot agree as to the punishment, you should certify your disagreement to the Court, and the Court shall, under the law, impose a sentence of imprisonment for life. Your verdict shall be in the following form:

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

"We, the Jury, after due deliberation, have been unable to agree upon the punishment and hereby so certify and request the Court to dismiss the Jury from further deliberation."

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

NO. U-337

DEFENDANT

(Caption Omitted In Printing)

JURY INSTRUCTION NO. D-18

You have found the defendant guilty of the crime of capital murder. You must now decide whether the defendant will be sentenced to death or to life imprisonment. In reaching your decision you must objectively consider the detailed circumstances of the offense for which the defendant was convicted, and the defendant himself.

To return the death penalty, you must unanimously find from the evidence beyond a reasonable doubt that aggravating circumstances – those which tend to justify the death penalty – outweigh mitigating circumstances – those which tend to justify the less severe penalty of life imprisonment.

If you unanimously find from the evidence in this case beyond a reasonable doubt the following aggravating circumstance:

1. The capital murder was committed for pecuniary gain.

then you must proceed to weigh the aggravating circumstance and the mitigating circumstances, one against the other, to determine whether the aggravating circumstance, if any, outweighs the mitigating circumstances.

The mitigating circumstances which you may consider include the following:

1. Whether the defendant has no significant history of prior criminal activity.
2. Whether the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
3. Whether the defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.
4. Whether the defendant acted under extreme duress or under the substantial domination of another person.
5. Whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
6. The age of the defendant at the time of the crime [if you consider it a factor which reasonably mitigates against imposition of the death penalty].
7. Any circumstance or combination of circumstances surrounding the offense which reasonably mitigates against imposition of the death penalty.
8. Any circumstance or combination of circumstances surrounding the defendant's life and character which reasonably mitigates against imposition of the death penalty.

If you unanimously find from the evidence, beyond a reasonable doubt the aggravating circumstance listed above, and if, after weighing the mitigating circumstances and the aggravating circumstance, one against the other, you further find unanimously from the evidence beyond a reasonable doubt that the aggravating circumstance outweighs the mitigating circumstances and that

the death penalty should be imposed, your verdict shall be written on a separate sheet of paper, shall be signed by your foreman, and shall be in the following form:

"We, the jury, find unanimously and beyond a reasonable doubt the following aggravating circumstance:

1. The capital murder was committed for pucaniary [sic] gain.

We, the jury, further find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstances and the aggravating circumstance, one against the other, that the mitigating circumstances do not outweigh the aggravating circumstance and that the defendant should suffer the penalty of death.

FOREMAN OF THE JURY"

If you fail to find the aggravating circumstance unanimously and beyond a reasonable doubt, or, if you find the aggravating circumstance unanimously and beyond a reasonable doubt, but after weighing the mitigating circumstances and the aggravating circumstance, one against the other, you fail to unanimously find beyond a reasonable doubt that the aggravating circumstance outweighs the mitigating circumstances, then your verdict shall be written on a separate piece of paper and be in the following form:

"We, the jury, find that the defendant should be sentenced to imprisonment for life in the state penitentiary."

If, after reasonable deliberation, you cannot agree as to the punishment, you should certify your disagreement to the Court and the Court shall, under the law, impose a sentence of imprisonment for life. Your verdict shall be written on a separate piece of paper in the following form:

Refused

"We, the jury, after due deliberation, have been unable to agree upon the punishment and hereby so certify and request the Court to dismiss the jury from further deliberation."

Jury Verdict

We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances:

1. The Defendant [sic] contemplated that life would be taken and/or the capital murder was intentionally committed and the Defendant [sic] shared in that intent, while the Defendant [sic] was engaged in an attempt to commit a robbery; and was committed for pecuniary gain.

2. The capital murder was committed for the purpose of avoiding or preventing the detection and a lawful arrest of JAMES R. STRINGER, THE DEFENDENT [sic].

3. The capital murder was especially heinous [sic], atrocious or cruel.

We, the Jury, further find unanimously from the evidence and beyond a reasonable doubt after weighing the mitigating circumstances and the aggravating circumstances, one against the other, that the aggravating circumstances

do outway the mitigating circumstances and the Defendant [sic] should suffer the penalty of death.

/s/ Cecil C. Ferrell
FOREMAN OF THE JURY

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

CAUSE NO. U-337

VS.

Filed September 24, 1982

JAMES R. STRINGER

JURY VERDICT AND SENTENCING
OF THE DEFENDANT BY THE COURT

Now comes the District Attorney who prosecutes for and on behalf of the State of Mississippi and the Defendant, James R. Stringer, in his own proper person, in custody and by counsel, being called to answer a charge of Capital Murder, being arraigned upon the charge in the indictment, duly entered a plea of Not Guilty thereto.

Thereupon came a Jury of twelve good and lawful citizens who being duly empanelled, specially sworn and charged to well and truly try the issue joined and a true verdict render according to the law and the evidence. After hearing all the evidence and arguments of counsel, and receiving the instructions of the Court, retired and presently returned into open Court the following verdict, to-wit:

"We, the Jury, find the Defendant, James R. Stringer, guilty of Capital Murder."

And the Jury, having again retired for the purpose of fixing punishment, after being further instructed by the Court and hearing further argument of counsel, presently returned into open Court the following verdict as to punishment, to-wit:

"We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances:

1. The Defendant contemplated that life would be taken and/or the capital murder was intentionally committed and the Defendant shared in that intent, while the Defendant was engaged in an attempt to commit a robbery; and was committed for pecuniary gain.

2. The capital murder was committed for the purpose of avoiding or preventing the detection and a lawful arrest of James R. Stringer, the Defendant.

3. The capital murder was especially heinous [sic], atrocious or cruel."

"We, the Jury, further find unanimously from the evidence and beyond a reasonable doubt after weighing the mitigating circumstances and the aggravating circumstances, one against the other, that the aggravating circumstances do outway the mitigating circumstances and the Defendant should suffer the penalty of death."

Said verdict being signed by Cecil C. Ferrell, Foreman of said Jury.

IT IS, THEREFORE, ORDERED AND ADJUDGED, that the Defendant, James R. Stringer, for such his offense of Capital Murder, which he has been found guilty, and for which the Jury has determined that he should suffer penalty of death, be and he is hereby sentenced to be remanded to the lawful custody of the Sheriff of Hinds County, Mississippi, for immediate transportation to the Maximum Security Unit at the Mississippi State Penitentiary, Parchman, Mississippi, where at some time on the

12th day of November, A.D. 1982, he shall suffer the penalty of death by lethal gas.

SO ORDERED, this the 24 day of September, A.D. 1982.

/s/ (illegible)
CIRCUIT JUDGE

Supreme Court of Mississippi.

James R. STRINGER

v.

STATE OF Mississippi,

No. 54580.

Jan. 15, 1986.

Rehearing Denied April 9, 1986.

En Banc.

ANDERSON, Justice, for the Court:

**MOTION TO VACATE OR SET ASIDE
JUDGMENT AND SENTENCE**

Petitioner James R. Stringer was convicted of capital murder and sentenced by a jury of the Circuit Court of the First Judicial District of Hinds County to suffer the death penalty. The conviction and sentence were affirmed unanimously by this Court on July 11, 1984, and rehearing was denied on August 15, 1984. The facts in this case and the ruling thereon are set forth in *Stringer v. State*, 454 So.2d 468 (Miss. 1984).

Stringer filed a petition for writ of certiorari in the United States Supreme Court which was denied on February 19, 1985, in *Stringer v. Mississippi*, ___ U.S. ___, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1985).

Petitioner then filed this motion to vacate or set aside judgment and sentence on June 17, 1985, in accordance with the Mississippi Uniform Post Conviction Relief Act [collateral relief act, Mississippi Code, Annotated, Section 99-39-1, *et seq.* (Supp.1984)].

CLAIM

Petitioner was deprived of his right to effective assistance of counsel due to trial counsel's representation of multiple defendants.

At the time of Petitioner's trial, Petitioner had hired Sam Wilkins to represent Petitioner, Petitioner's son "Jombo" and Petitioner's girlfriend, Tammy Williams, all charged with capital murder arising out of the same incident. Petitioner now alleges that trial counsel's improper representation of several defendants in the same case constituted a conflict of interest which rendered the assistance of counsel ineffective.

This Court readily recognizes the rule that effective assistance of counsel encompasses the right to representation by an attorney who does not owe conflicting duties to other defendants as set forth in *Glasser v. U.S.*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). However, the court has repeatedly held that joint representation of co-defendants is not per se violative of the Sixth Amendment right to effective assistance of counsel. *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); *Beran v. U.S.*, 580 F.2d 324 (8th Cir.1978); *U.S. v. Lawriw*, 568 F.2d 98 (8th Cir.1977).

In *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333, 348 (1980), the court stated:

We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

The Court in *Irving v. Hargett*, 518 F.Supp. 1127 (N.D.Miss.1981), set forth the necessary determination of whether counsel in fact, slighted the defense of one defendant for that of another in order to establish a conflict. It has been firmly established that a potential for conflict or hypothetical or speculative conflicts will not suffice for reversal. The conflict must be actual. *U.S. v. Alvarez*, 580 F.2d 1251 (5th Cir.1978); *Cuyler, supra*. Therefore, we need not consider speculative possibilities of conflicts in attempts to plea bargain or use other possible defenses that were not raised at trial.

The petitioner in this case was tried first and all three defendants testified for the defense. Each defendant had similar interests and each consistently asserted the theory of alibi as a defense. Petitioner failed to show any instance where any of the three were in any adversarial or conflicting position during or as a result of the joint representation during either the guilt or sentencing phase of the trial.

In *Thomas v. State*, 472 So.2d 428 (Miss.1985), petitioners argued that their guilty pleas should be set aside because of a conflict of interest which existed because they were both represented by the same attorney. This Court held that since both appellants insisted on sticking together and entering the same plea, there was no actual conflict of interest.

It is the opinion of this Court that the petitioner in this case has also failed to show any actual conflict of interest or prejudice as a result of the joint representation of multiple defendants.

This Court has carefully considered each of the petitioner's claims for relief and finds that all issues raised on direct appeal have been addressed and final determination made. Each of petitioner's claims were raised on direct appeal or they were not appealed at all, or were not raised at the trial level, rendering them procedural barred or res judicata and are not subject to further review. *Dufour v. State*, 483 So.2d 307 (Miss.1985); *Tokman v. State*, 475 So.2d 457 (Miss.1985); *Leatherwood v. State*, 473 So.2d 964 (Miss.1985). We further find that the claims brought forth in this petition are without merit. Therefore, petitioner's Motion to Vacate or Set Aside Judgment and Sentence is denied.

PATTERSON, C.J., WALKER and ROY NOBLE LEE, P.JJ., and HAWKINS, DAN M. LEE, PRATHER, ROBERTSON, and SULLIVAN, JJ., concur.

United States Court of Appeals,
Fifth Circuit.

James R. STRINGER,
Petitioner-Appellant,

v.

Charles J. JACKSON, Interim Commissioner,
Mississippi Dept. of Corrections, et al.,
Respondents-Appellees.

No. 88-4126.

Dec. 22, 1988.

Rehearing and Rehearing En Banc Denied Jan.
20, 1989.

Before REAVLEY, JOHNSON and DAVIS, Circuit
Judges.

REAVLEY, Circuit Judge:

James R. Stringer seeks the writ of habeas corpus to avoid his sentence of death by the Mississippi courts. We affirm the district court's denial of the writ.

I. Background

On the evening of June 21, 1982, Ray McWilliams and his wife, Nell McWilliams, were murdered in their home in Jackson. The State's case against James Stringer rested upon the testimony of Rhonda Brock and Mike Meddars, two of the five alleged participants in the crime, who testified that Stringer initiated the plan to rob the victims in their home and then to kill them in order to prevent detection. Stringer, who maintained his innocence throughout the trial, offered an alibi in his defense at the guilt phase of the proceeding. His son, Jimbo, and his

girlfriend, Tammy, both of whom were under indictment for the same crime at the time of trial, also testified at the guilt phase and corroborated his alibi. Attorney Sam Wilkins, a personal friend of Stringer's and Wilkins' associate, James Nelson, represented Stringer as well as the son and girlfriend.

Stringer was convicted of capital murder in the death of Nell McWilliams and sentenced to death. The Mississippi Supreme court unanimously affirmed. *Stringer v. State*, 454 So.2d 468 (Miss.1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1985). Subsequently that court denied Stringer's motions to vacate or set aside judgment and sentence. *Stringer v. State*, 485 So.2d 274 (Miss.), *cert. denied*, 479 U.S. 922, 107 S.Ct. 327, 93 L.Ed.2d 300 (1986). In response to the habeas corpus petition the federal district court stayed execution on January 12, 1987, held an evidentiary hearing on the issue of effective assistance of counsel, and then denied relief. *Stringer v. Scroggy*, 675 F.Supp. 356 (S.D.Miss.1987). The district court denied motion to alter or amend on January 22, 1988.

Stringer appeals on several grounds: (1) that prosecutorial misconduct caused the death sentence to be based on impermissible factors; (2) that the trial court's instructions at the sentencing phase violated the Eighth Amendment, improperly limited the jury's consideration of mitigating circumstances, and improperly guided the jury regarding its consideration of aggravating circumstances; (3) that the trial court erred in refusing to instruct the jury regarding lesser included offenses; (4) that trial counsel failed to provide effective assistance; (5) that appellate counsel rendered ineffective assistance;

and (6) that the introduction of certain photographs into evidence violated his due process rights. Because each of Stringer's points of error is either procedurally barred or without merit, we affirm the district court's denial of the writ.

II. Prosecutorial Misconduct

Stringer contends that his sentence of death should be overturned because of several alleged instances of prosecutorial misconduct: (1) comments made during voir dire and closing argument; (2) photographs of the McWilliams introduced into evidence; and (3) comments made regarding Stringer's refusal to take a polygraph test. Both the district court and the Mississippi Supreme Court held that this claim was procedurally barred because no objections were raised either at trial or on direct appeal. *Stringer*, 675 F.Supp. at 365; *Stringer*, 485 So.2d at 275. We agree that these complaints are procedurally barred. Moreover, we see no merit here. For example, Stringer complains about a statement that prosecutor made during closing, but the trial court did all that it was requested to do by sustaining the defense counsel's objection. If the introduction of the photographs and comments about them and the polygraph test were improper under any law, there was clearly no prejudice to Stringer's substantial rights. See *Felde v. Blackburn*, 795 F.2d 400, 403 (5th Cir.1986), *cert. denied*, ___ U.S. ___, 108 S.Ct. 210, 98 L.Ed.2d 161 (1987). As for the contention that the prosecutor misled the jury into believing that the decision on Stringer's sentence rested with appellate judges rather than with them, in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231

(1985), Stringer points to two statements made during voir dire of prospective jurors: (1) that there are "nine Judges sitting up there on the Supreme Court that I've got to talk to"; and (2) that "[t]he Court has to make a decision and then ultimately other Courts may have to make a decision." Stringer has taken the prosecutor's comments out of context. The prosecutor was explaining to a juror that the law required that his questions be precise, not arguing that higher authorities substituted their discretion for that of the jury on the matter of punishment. The statements would not lessen the jury's sense of responsibility in considering the death sentence.

III. Jury Instructions

Stringer asserts several points of error based on the trial court's instructions to the jury.

A. Life Option

Stringer contends that the trial court not only omitted necessary language from the instructions, but also included language "which would have misled the jury about whether mercy could be extended to the appellant." Stringer failed to raise this point before the district court and we need not address it. See *Willie v. Maggio*, 737 F.2d 1372, 1387-88 n. 20 (5th Cir.), *cert. denied*, 469 U.S. 1002, 105 S.Ct. 415, 83 L.Ed.2d 342 (1984). Moreover, the trial court's charge may not be construed as Stringer argues.

The trial court instructed the jury that it could return a life sentence if it found no aggravating circumstances or

if it failed to find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances.¹ In order to impose the death penalty, the jury was instructed that it must find both that the aggravating circumstances outweighed the mitigating circumstances *and* that the death penalty should be imposed. Furthermore, the jury was told that the defendant would be sentenced to life imprisonment if they could not agree on punishment. These instructions did not make the death penalty mandatory. See *Edwards v. Scroggy*, 849 F.2d 204, 213 (5th Cir.1988) (citing *Edwards v. Thigpen*, 595 F.Supp. 1271, 1286 (S.D.Miss.1984)).

Stringer next complains that, as in *Mills v. Maryland*, ___ U.S. ___, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), the

¹ The jury was instructed as follows:

If you fail to find any aggravating circumstance(s) unanimously and beyond a reasonable doubt, or, if you find unanimously and beyond a reasonable doubt, one or more aggravating circumstance, but after weighing the aggravating and mitigating circumstance(s), one against the other, you fail to unanimously find, beyond a reasonable doubt, that the aggravating circumstance(s) outweigh the mitigating circumstance(s), then your verdict shall be in the following form:

"We the Jury, find the defendant should be sentenced to imprisonment for life in the state penitentiary."

If, after reasonable deliberation, you cannot agree as to the punishment, you should certify your disagreement to the Court, and the Court shall, under the law, impose a sentence of imprisonment for life.

trial court erred in instructing the jury that it must unanimously find mitigating circumstances before it might weigh them against aggravating circumstances. The result of such an instruction, Stringer alleges, is that the sentencing phase of the trial became subject to the possibility of a completely arbitrary decision to impose death because one juror could prevent all other jurors from considering a particular mitigating circumstance.

In *Mills*, the Supreme Court considered the propriety of a verdict form submitted to a jury in a Maryland state court and concluded that "there is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Mills*, 108 S.Ct. at 1870. In vacating the judgment which sustained the imposition of the death penalty, the Court focused on the specific instructions given in that particular case.

Although the trial court undoubtedly added "unanimously" by oversight as the third word in the instructions quoted below,² a reading of the entire charge would

² The jury was instructed, in pertinent part, as follows:

If you unanimously find from the evidence any one or more of the mitigating circumstance(s) listed above exists, and, if after weighing the mitigating circumstance(s) and the aggravating circumstance(s), one against the other, you further find unanimously from the evidence beyond a reasonable doubt that

(Continued on following page)

not have led the jurors to think they were compelled to ignore mitigating circumstances (unless found unanimously) in determining an appropriate sentence for Stringer. The instructions given did not restrict the jury's right and power to consider the appropriateness of the death penalty even after it found that the aggravating circumstances outweighed the mitigating circumstances.

B. Mitigating Circumstances

Stringer claims that the trial court's instruction improperly restricted the jury's consideration of mitigating circumstances in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The trial court instructed the jury that it could consider as mitigating,

(Continued from previous page)

the aggravating circumstance(s) outweigh the mitigating circumstance(s) and the death penalty should be imposed, your verdict shall be written on a separate sheet of paper, shall be signed by your foreman, and shall be in the following form:

"We, the Jury, find unanimously, and beyond a reasonable doubt the following aggravating circumstance(s); (list the aggravating circumstance(s), if any, which you unanimously find beyond a reasonable doubt from those listed above in the same language as they are listed.) We, the Jury, further find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstance(s) and the aggravating circumstance(s), one against the other, that the aggravating circumstance(s) do outweigh the mitigating circumstance(s) and that the defendant should suffer the penalty of death." (emphasis added)

among other things, "any and all other matters, facts or circumstances, or combination of circumstances surrounding the defendant's life, character or record or any circumstance(s) of the offense brought before you during the trial of this cause, which you, the Jury, deem to be mitigating on behalf of the defendant or which reasonably mitigate against imposition of the death penalty." Under this instruction, Stringer's attorney was free to argue and the jury was free to consider whatever mitigating evidence was raised.

C. Aggravating Circumstances

Relying on *Maynard v. Cartwright*, ___ U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), Stringer asserts that his death sentence should be set aside since the trial court failed to define the unconstitutionally overbroad "especially heinous, atrocious, and cruel" aggravating circumstance. The State maintains that our decision in *Edwards v. Scroggy*, 849 F.2d 204 (5th Cir.1988), forecloses Stringer's argument. In *Edwards*, the defendant-appellant argued that there was insufficient evidence to support one of the aggravating circumstances found by the jury and that, therefore, his death sentence should be vacated. This court, assuming for the sake of argument that the aggravating circumstance complained of was invalid, determined that the death sentence should stand. In so holding, the court distinguished the case before it from that presented in *Maynard*:

[*Maynard*] was remanded to the Oklahoma court to determine as a matter of state law whether the sentence should be set aside. Unlike Oklahoma law, however, Mississippi law is clear that

one invalid aggravating circumstance will not suffice to overturn a death penalty where other valid aggravating circumstances remain.

Edwards, 849 F.2d at 211 n. 7 (citations omitted). Actually, the Supreme Court affirmed the Tenth Circuit's judgment which vacated the death sentence and remanded the cause to the state court for such further proceedings as it might wish to conduct.

The facts in *Maynard* are, however, distinguishable from those presented in *Edwards* and those presented here. In *Maynard*, the State advanced the argument that the death sentence should be upheld because there was a valid aggravating circumstance remaining. In rejecting this argument, the Supreme Court noted that at the time that Cartwright's case was decided, the Oklahoma Court of Criminal Appeals itself would not attempt to save a death penalty when one of the aggravating circumstances was found invalid, but instead would automatically impose a sentence of life imprisonment. Noting that, since Cartwright's conviction, the Oklahoma Court of Criminal Appeals had determined that it would not necessarily set aside a death penalty where on appeal one of several aggravating circumstances was found invalid, the Court wrote that "[w]hat significance these decisions of the Court of Criminal Appeals have for the present case is a matter for the state courts to decide in the first instance." *Maynard*, 108 S.Ct. at 1860. By contrast, the Mississippi Supreme Court has held that a death sentence should be upheld even though an aggravating circumstance is found invalid or unsupported by the evidence, so long as at least one aggravating circumstance remains. See, e.g., *Lanier v. State*, 533 So.2d 473 (Miss.1988) (en

banc); *Johnson v. State*, 511 So.2d 1333, 1337 (Miss.1987), *rev'd on other grounds*, ___ U.S. ___, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); *Irving v. State*, 498 So.2d 305, 314 (Miss.1986), *cert. denied*, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 826 (1987); *Edwards v. State*, 441 So.2d 84, 92 (Miss.1983).

There is another reason that *Maynard* does not control the disposition of this case. In *Maynard*, the Supreme Court did not directly address the specific issue confronting us here: Must a death sentence be vacated when one of the three statutory aggravating circumstances found by the jury is subsequently held to be invalid and the jury was instructed to weigh the statutory aggravating circumstances against all mitigating circumstances in determining an appropriate sentence? For the reasons given below, we conclude that it must not.

The Supreme Court, in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), addressed a similar issue involving Georgia's capital sentencing scheme. In *Zant*, a jury found the defendant guilty of murder. The court then instructed the jury at the sentencing phase of the trial that it must find one or more statutory aggravating circumstances in order to fix punishment at death, but that in determining the appropriate sentence, "the jury was authorized to consider all of the evidence received during the trial as well as all facts and circumstances presented in extenuation, mitigation, or aggravation during the sentencing proceeding." *Zant*, 103 S.Ct. at 2737. The jury found three aggravating circumstances beyond a reasonable doubt and sentenced Stephens to death. The Georgia Supreme Court later held one of the statutory aggravating circumstances invalid on the

ground that it was unconstitutionally vague, yet determined that the other two aggravating circumstances adequately supported the death sentence. *Id.* at 2738.

The United States Supreme court ultimately upheld this decision, rejecting the defendant's contention that Georgia's statutory scheme was invalid under the holding in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). In so doing, the Court emphasized two important features of Georgia's scheme which it determined adequately channelled the fact-finder's discretion in imposing a sentence: first, that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and second, that the state supreme court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate. *Zant*, 103 S.Ct. at 2742. The Court summarized its cases concerning the treatment of statutory aggravating circumstances:

Our cases indicate, then, the statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.

Zant, 103 S.Ct. at 2743-44 (citations and footnote omitted).

The Mississippi capital sentencing scheme, though similar in many respects to Georgia's scheme, differs in one material aspect. Like Georgia, Mississippi requires the jury to find at least one statutory aggravating circumstance beyond a reasonable doubt in order to consider imposing the death penalty. Like Georgia, Mississippi requires the state supreme court to review each death penalty for arbitrariness and proportionality. Unlike Georgia, however, Mississippi requires that the jury weigh statutory aggravating circumstances against all mitigating circumstances as part of its process in deciding an appropriate sentence. Therefore, in Mississippi, unlike in Georgia, the finding of a statutory aggravating circumstance plays some role in guiding the sentencing body in the exercise of its discretion in addition to its function of narrowing the class of defendants convicted of murder who are eligible for the death penalty. Even if the jury determines that the statutory aggravating circumstances outweigh the mitigating circumstances, however, the jury is always entitled to return a sentence of life imprisonment.

We believe that the Mississippi capital punishment scheme, as applied in this case, passes constitutional muster for virtually the same reasons articulated by the Supreme Court in *Zant*. The jury in this case, like the jury in *Zant*, found the existence of three statutory aggravating circumstances and identified them in writing. On appeal, the Mississippi Supreme Court found that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor, that the evidence was sufficient to support the jury's findings on each statutory aggravating circumstance, and that the

sentence of death was not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. *Stringer*, 454 So.2d at 478-79.

The Supreme Court, in *Maynard*, determined that the "especially heinous, atrocious, or cruel" aggravating circumstance, when submitted for the jury's consideration without a limiting instruction, is unconstitutionally overbroad. The facts of this case do not, however, require that Stringer's death sentence be vacated. The jury found that two other aggravating circumstances existed as well. This satisfies any constitutional concerns and adequately channels the jury's discretion. When the jury's discretion in sentencing is narrowed by its finding of appropriate aggravating factors, there should be no constitutional objection to the jury considering the heinousness of the crime – even though heinousness, as defined or even under the facts, would not alone have narrowed the jury's discretion so as to satisfy Eighth Amendment requirements. Contrast the case of *Johnson v. Mississippi*, ___ U.S. ___, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988), where evidence supporting the invalidated aggravating circumstance was inadmissible and prejudicial.

That the jury was instructed to weigh statutory aggravating circumstances against mitigating circumstances does not alter the federal decision. We see no difference other than one in semantics, between instructing a jury to weigh aggravating against mitigating circumstances in determining the sentence and instructing a jury to consider all aggravating and mitigating circumstances in deciding on the sentence. Had this jury been instructed as the jury was in *Zant*, it would have been constitutionally authorized to consider as aggravating all

the facts and circumstances surrounding the crime – for instance, whether it believed the crime to be heinous, atrocious, or cruel – and to use those considerations in arriving at a sentencing decision. That it was not so instructed, that is, that the court limited its consideration to only statutory aggravating circumstances, is a matter of state law only. *Zant*, 103 S.Ct. at 2743 n. 17. We look to Mississippi to decide the impact of the invalid aggravating circumstance on Stringer's death sentence. Mississippi has held that the invalidation of an aggravating circumstance will not affect the death sentence so long as there is at least one valid aggravating circumstance remaining. Here, two valid aggravating circumstances remained. We overrule Stringer's argument.

D. Lesser Included Offense

Stringer next complains that the trial court erred in failing to instruct the jury on a lesser included offense of non-capital murder or manslaughter. This is a new complaint, but it has no merit. Stringer introduced no evidence on which the jury rationally could have found him guilty of a lesser offense and acquitted him of the greater offense. See *Beck v. Alabama*, 447 U.S. 625, 635, 100 S.Ct. 2382, 2388, 65 L.Ed.2d 392 (1980) (quoting *Keeble v. United States*, 412 U.S. 205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973)). Under the evidence presented at trial, either Stringer led a gang of robbers with the intent to murder the two victims, or he was at home nursing a back pain.

IV. Assistance of Trial Counsel

A. Failure to Present Mitigating Evidence

Stringer asserts that his right to the effective assistance of counsel at trial was violated in that his trial

counsel neither prepared nor presented a case in mitigation at the sentencing phase of the trial. The district court held an evidentiary hearing limited to the issues of the effectiveness of trial and appellate counsel and found that Stringer did receive effective assistance. Stringer's trial attorneys, Sam Wilkins and James Nelson, and Stringer's appellate counsel, Harry Kelly, testified at the hearing.

The United States Supreme Court articulated the standard by which we evaluate the effectiveness of counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order for a convicted defendant's ineffective assistance claim to prevail, he must show both that counsel's performance was deficient and that the deficiency actually prejudiced his defense, thereby making the result of the trial unreliable. *Id.* at 687, 104 S.Ct. at 2064. Because it is all too easy for a reviewing court to conclude that a particular defense was unreasonable once that defense has proved unsuccessful, we give great deference to counsel's performance and evaluate its reasonableness in light of the facts and circumstances as they appeared to exist at the time of trial. *Id.* at 689, 104 S.Ct. at 2065. Applying this standard to the facts before us, we conclude that Stringer received effective assistance at trial.

At the district court's hearing, Wilkins testified that he had spent the majority of his time preparing for the guilt phase of the trial and that he was "devastated" when the jury returned a guilty verdict. He testified further that he could not recall the details of what occurred between the announcement of the guilty verdict and the sentencing phase of the trial or how the decision was reached not to present mitigating evidence. Wilkins

did state, however, that he had not formally investigated possible mitigating evidence since he already had personal knowledge of Stringer's background and friends.

Nelson, Wilkins' associate, testified that he and Wilkins conferred with Stringer following the conclusion of the trial's guilt phase, at which time they explained the purpose of the mitigation case and discussed which family members could testify. According to Nelson, Stringer told them in no uncertain terms that he did not want his family to testify in his behalf. Stringer did not testify at the hearing. It is now argued that even if Stringer forbade the use of family members as witnesses, he did not prohibit the use of other witnesses or other evidence.

The failure to present a case in mitigation during the sentencing phase of a capital murder trial is not, per se, ineffective assistance of counsel. This court has often upheld decisions not to put on mitigating evidence where the decision resulted from a strategic choice. *See, e.g., Moore v. Maggio*, 740 F.2d 308, 315-16 (5th Cir.1984), *cert. denied*, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985); *Lowenfield v. Phelps*, 817 F.2d 285, 291 (5th Cir. 1987), *aff'd*, ___ U.S. ___, 108 S.Ct. 546, 98 L.Ed. 2d 568 (1988).

Stringer contends, however, that Wilkins made no strategic choice in this case and cites as proof Wilkins' statement at the habeas proceeding that he had no reason based on sound trial strategy for not preparing and presenting certain witnesses for the sentencing decision. We disagree. In concluding that Stringer received effective

assistance at trial, the district court apparently discredited much of Wilkins' testimony, which it was entitled to do. Furthermore, the district court had good reason to see Wilkins' decision not to present additional mitigating evidence as understandable strategy. We agree with the district court for the reason originally given by the Mississippi Supreme Court upon the direct appeal. 454 So.2d at 475-78.

The jury, in returning a guilty verdict, showed what they thought of Stringer's alibi. They had found him guilty of a deliberate massacre of innocent human beings. The testimony of someone who had known and liked Stringer years ago was not going to lessen the impact of the evidence. Stringer's only hope was to get at least one juror to have enough misgiving regarding his guilt to block the death penalty. Wilkins attempted to do just that by arguing that he and his client had to accept the verdict of guilty but that any qualms a juror might have regarding Stringer's guilt should be resolved against imposing the death penalty. On the record before us, we are in no position to say that this was not the best that could be done for Stringer.

Furthermore, Stringer has been unable to establish that he was prejudiced by trial counsel's performance. Stringer asserts that Wilkins should have presented evidence of his war record, his medical record, and his reputation as a businessman and family man in mitigation. Based on the State's evidence presented during the guilt phase, which the jury obviously believed, we cannot conclude that there is a reasonable probability that, but for Wilkins' failure to present this evidence, the result of

the proceeding would have been different. See *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

B. Conflict of Interest

Stringer also asserts that his trial counsel was ineffective because he had a conflict of interest. Stringer bases his claim on the fact that Wilkins represented two other codefendants in addition to Stringer.

"Requiring or permitting a single attorney to represent codefendants . . . is not *per se* violative of constitutional guarantees of effective assistance of counsel." *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638 (1987) (quoting *Holloway v. Arkansas*, 435 U.S. 475, 482, 98 S.Ct. 1173, 1178, 55 L.Ed.2d 426 (1978)). In order to prevail on such a claim, having made no objection at trial, Stringer must demonstrate that an actual conflict existed by pointing to specific instances in the record which reflect that Wilkins' performance in his behalf was adversely affected. See *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980); *United States v. Fox*, 613 F.2d 99, 102 (5th Cir. 1980). Speculative or merely hypothetical conflicts do not implicate the Sixth Amendment right to the effective assistance of counsel. *Baty v. Balkcom*, 661 F.2d 391, 395 (5th Cir. Unit B Nov. 1981), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); *Foxworth v. Wainwright*, 516 F.2d 1072, 1077 n. 7 (5th Cir. 1975). The petitioner must specifically identify instances in the record that reflect that his counsel "made a choice between possible alternative courses of action such as eliciting (or failing to elicit) evidence, helpful to one client but harmful to the other."

United States v. Mers, 701 F.2d 1321, 1328 (11th Cir.) (quoting Comment, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants*, 68 J.Crim.L. & Criminology 226, 232 (1977)), cert. denied, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983). Stringer has not made that showing here.

Stringer contends that Wilkins' representation of both himself and his son and codefendant, Jimbo Stringer, was an obvious actual conflict of interest because, under the State's theory, Jimbo was targeted as a triggerman while Stringer was not. These facts alone do not establish an actual conflict of interest. Stringer's defense was alibi, and all three of Wilkins' clients told the same story. At the time that Wilkins undertook the representation of the codefendants, he told them that if they all were telling the truth he would have no conflict of interest, but that if they had in fact committed the charged crime then he would have a conflict of interest. All three stood by their stories, as did the other alibi witnesses who spoke with Wilkins. Stringer did not contradict Wilkins' testimony regarding this discussion at the hearing, and the district court accepted Wilkins' testimony as true.

Stringer next alleges that an actual conflict is evident based on the prosecution's reference in closing argument to five of the six defense witnesses as "Sam's Army." Each of those five witnesses had testified that Sam Wilkins represented him or her. The prosecution, in an attempt to discredit the witnesses, stated during argument that one of the many unanswered questions in the case was why all of these witnesses chose Sam Wilkins as their lawyer. Stringer argues that Wilkins' readiness to represent so many people involved in the case that the

prosecutor could get away with referring to the defense witnesses collectively as "Sam's Army" worked to his detriment in that Wilkins never discussed other possible defenses that might be raised in Stringer's behalf. But that suggests no conflict; no other defenses were discussed for the simple reason that this defense, assuming its truth, was the only defense for all of his clients.

Stringer also claims that Wilkins' performance reflected a conflict of interest at the trial's sentencing phase. He asserts that Wilkins should have argued to the jury that even under the State's theory of the case, he was not the triggerman who actually killed Nell McWilliams. To make such an argument would have shown Stringer's willingness to lay the blame for the murder on his own son in order to save himself. Wilkins testified that "even in retrospect" he would not have made this argument. Not only would it have undermined any doubt the jurors had regarding Stringer's guilt, but also it would have sent the wrong message to the jury regarding Stringer's character and family commitment. Stringer has failed to demonstrate an actual conflict.

V. Assistance of Appellant Counsel

Stringer next contends that he was denied effective assistance of counsel on appeal due to his appellate attorney's alleged conflict of interest. Harry Kelly took over representation of both Stringer and his son, Jimbo, following Stringer's conviction for murder. Stringer primarily urges in regard to this claim that Kelly rendered ineffective assistance of counsel because he failed to raise two issues in Stringer's appeal that he did raise in

Jimbo's case. Those two issues were (1) the use of graphic photographs of the McWilliams and (2) the use of a facsimile riot gun.

Kelly testified at the hearing below that in conducting Stringer's appeal he had chosen to concentrate only on what he considered to be the strongest arguments for Stringer. The Supreme Court stated in *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667, 91 L.Ed.2d 434 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987 (1983)), that the "process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Stringer asserts, however, that Kelly did not, in fact, winnow out only the weaker arguments from Stringer's appeal. To support his contention, Stringer points to the two issues excluded from Stringer's appeal that were included in Jimbo's appeal and the additional points Kelly raised in the brief supporting Stringer's motion for rehearing filed with the Mississippi Supreme Court.

That Kelly could have raised additional points on appeal and that he did raise additional points in a motion for rehearing do not indicate that he did not "winnow out" the weaker arguments from Stringer's appeal. When Kelly came into the case Stringer had been tried and the record had been made. Kelly could do no more than present those arguments that he believed worked most strongly in Stringer's favor.

Further, as the State points out and as the record reflects, Stringer did not have available to him the same

arguments Kelly raised in Jimbo's behalf regarding the photographs and the riot gun. In Jimbo's trial for the murder of Ray McWilliams, the prosecutor displayed slides of Nell McWilliams to the jury during his closing argument. Later, on appeal, the Mississippi Supreme Court held that the introduction of the photographs into evidence was not reversible error, but that the display of the photographs during closing argument, when combined with other prosecutorial tactics, so prejudiced the jury that Jimbo could not have received a fair sentencing trial. See *Stringer v. State*, 500 So.2d 928, 934-35 (Miss.1986). One such tactic referred to was the prosecutor's argument that this was the jury's last chance to give Jimbo the death penalty since he had received a life sentence for Nell McWilliams' murder. This argument was not made in Stringer's trial.

Similarly, Kelly could not have made the same argument for Stringer with regard to the "facsimile riot gun"; that gun was never introduced at Stringer's trial. The State did introduce the .38 caliber pistol found in Stringer's boot when he was arrested. Kelly raised that point and the Mississippi Supreme Court addressed it on Stringer's direct appeal. *Stringer*, 454 So.2d at 475.

Stringer has not shown that an actual conflict of interest existed due to Kelly's representation of both Stringer and Jimbo. After a full evidentiary hearing, the district court concluded that Stringer had "been unable to present facts, and not mere inferences, to show that Kelly had an actual conflict of interest which rendered him ineffective." *Stringer*, 675 F.Supp. at 364. We agree.

VI. Photographs

Finally, Stringer asserts for the first time on appeal that the admission of certain photographs of the murder scene violated his due process rights. Stringer did not present his claim to the district court and therefore we need not consider it on appeal. See *Willie*, 737 F.2d at 1387-88 n. 20. Furthermore, the evidence clearly does not offend constitutional due process.

The stay of sentence is vacated. The judgment of the district court denying the writ is AFFIRMED.

JOHNSON, Circuit Judge, dissenting.

It cannot be stated often enough that "death is qualitatively different from other punishments that can be imposed by the state." *Cartwright v. Maynard*, 822 F.2d 1477, 1483 (10th Cir. 1987) (en banc), *aff'd*, ___ U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). Because of the finality attendant with the punishment of death, it is critical that the process by which a criminal defendant is sentenced to death not be one tainted by error which could result in the imposition of the death sentence in a manner inconsistent with constitutional guarantees. In the instant case, an error of constitutional magnitude flawed the decision of the jury to sentence defendant James Stringer to death. Specifically, the jury was permitted to consider an unconstitutionally vague statutory aggravating circumstance during its sentencing deliberations, deliberations which involved the balancing of statutory aggravating and mitigating circumstances. Further, the improper consideration by the jury of the invalid aggravating circumstance was not cured on appeal by the

Mississippi Supreme Court. Moreover, the unconstitutionally vague aggravating circumstance was vigorously argued to the jury by the prosecutor as a justification for imposing the death sentence on Stringer. Today, a majority of this panel concludes that the above error does not necessitate a resentencing of Stringer. Persuaded that the eighth and fourteenth amendments to the Constitution demand the reversal of Stringer's death sentence which was imposed pursuant to a sentencing determination that included the consideration by the jury of an unconstitutional statutory aggravating circumstance in the balancing of aggravating and mitigating factors, I respectfully dissent.

Pursuant to the Mississippi death penalty scheme, defendants eligible for conviction for capital murder are limited to defendants committing murders in eight situations: murder of a peace officer or fireman; murder committed while under sentence of life imprisonment; murder committed by use of an explosive device; murder committed for remuneration; killing committed in the course of burglary, robbery, kidnapping, arson, rape, and other sexual offenses; killing committed in the course of felonious abuse of a child; and murder of an elected official. Miss.Code Ann. § 97-3-19(2) (Supp. 1987). By limiting the types of murders which may be classified as capital murders in such a fashion, Mississippi narrows the class of defendants eligible to receive the death penalty. Following the conviction of a defendant for capital murder in Mississippi, the jury is next required to determine whether any statutory aggravating circumstances exist to justify the imposition of the death penalty. To impose the death penalty on a defendant, the jury must

find at least one aggravating circumstance. Miss. Code Ann. § 99-19-103 (Supp. 1987); *Johnson v. Thigpen*, 806 F.2d 1243, 1247 (5th Cir. 1986), *cert. denied*, 480 U.S. 951, 107 S.Ct. 1618, 94 L.Ed.2d 802 (1987). After finding that at least one statutory aggravating circumstance exists, the jury is then required to weigh the statutory aggravating circumstances found against any mitigating circumstances found in deciding the appropriate punishment. Miss.Code Ann. § 99-19-103.

Pursuant to this process, the jury in the instant case found three statutory aggravating circumstances and, pursuant to the balancing analysis described above, sentenced Stringer to death. Specifically, the jury found the following three statutory aggravating circumstances in Stringer's case: (1) that the murder was intentional and committed while engaged in an attempt to commit robbery for pecuniary gain; (2) that the murder was committed for the purpose of avoiding or preventing detection and lawful arrest; and (3) that the murder was especially heinous, atrocious, or cruel. On appeal, Stringer challenges the constitutionality of the "especially heinous" aggravating circumstance, asserting that the aggravating circumstance is unconstitutionally vague.

Last term, the Supreme Court addressed the constitutionality of the especially heinous aggravating circumstance as applied under Oklahoma law in *Maynard v. Cartwright*, ___ U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), explaining the concept of vagueness in the context of capital punishment in the following manner:

Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment

and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972).

108 S.Ct. at 1858.

In *Maynard*, as will be discussed in greater detail subsequently, the Supreme Court held that the especially heinous aggravating circumstance as applied by the Oklahoma courts was unconstitutionally vague. *Id.* at 1859. In the instant appeal Stringer relies on the *Maynard* decision in seeking a reversal of his death sentence. The majority today nevertheless concludes that Stringer's claim in this regard is foreclosed by the recent decision of this Court in *Edwards v. Scroggy*, 849 F.2d 204 (5th Cir. 1988), *petition for cert. filed*, ___ U.S. L.W. ___ (U.S. Oct. 18, 1988).

In *Edwards*, a Mississippi capital murder case, the defendant Edwards was sentenced to death after the jury found six statutory aggravating circumstances. The *Edwards* Court, in rejecting a claim that the invalidation of one of the six statutory aggravating circumstances necessitated a resentencing of Edwards, relied on the holding by the Supreme Court in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), that "the invalidation of one aggravating circumstance [does] not require the vacation of the death penalty so long as there [are] other valid aggravating circumstances remaining." *Edwards*, 849 F.2d at 211. The *Edwards* Court, addressing the impact of the recent decision of the Supreme Court in *Maynard*, then reasoned that the *Maynard* decision was distinguishable for the reason that the Oklahoma law

reviewed in *Maynard* was unclear regarding the effect of the invalidation of one aggravating circumstance on the validity of a death sentence. The *Edwards* Court thereafter, in contrast, stated "Mississippi law is clear that one invalid aggravating circumstance will not suffice to overturn a death penalty where other valid aggravating circumstances remain." *Edwards*, 849 F.2d at 211 n. 7 (citation omitted). Thus, relying on the above distinction of the *Maynard* decision, the *Edwards* Court refused to vacate Edwards' death sentence.

The *Edwards* opinion, as stated by the majority, now constitutes Circuit precedent; nevertheless, I feel compelled to address what I perceive to be an important issue left unaddressed by this Court in *Edwards* and one which was purposefully reserved by the Supreme Court in *Zant* – that issue being the effect on the validity of a death sentence of a holding that "a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." *Zant*, 462 U.S. at 890, 103 S.Ct. at 2749.

In *Zant v. Stephens*, the Supreme Court concluded that the validity of a death sentence based in part on the consideration by the jury of an invalid aggravating circumstance "depends on the function of the jury's finding of an aggravating circumstance under [a state's] capital sentencing statute, and on the reasons that the aggravating circumstance at issue . . . was found to be invalid." *Id.* at 864, 103 S.Ct. at 2736. See also *Cartwright v. Maynard*, 822 F.2d 1477. In *Zant*, the Supreme Court addressed the validity of a death sentence imposed pursuant to Georgia

law under circumstances where the jury, in sentencing the defendant Stephens to death, was permitted to consider a statutory aggravating circumstance subsequently declared invalid by the Georgia Supreme Court. In its analysis of *Zant*, the Supreme Court initially noted that the function of a jury's finding of an aggravating circumstance under the Georgia capital sentencing scheme is to narrow the class of individuals eligible to receive the death penalty. In this regard, as long as one aggravating circumstance is found by the jury, the threshold dividing murderers in Georgia that are eligible for the death penalty and those murders that are not so eligible, is crossed. *Zant*, 462 U.S. at 870-72, 103 S.Ct. at 2739-40. Significantly, the *Zant* Court noted that a function which an aggravating circumstance does *not* serve under the Georgia statute is that of guiding the discretion of the sentencer in deciding whether to impose life imprisonment or death. *Id.* at 874, 103 S.Ct. at 2741. Georgia, unlike other states, does not instruct its juries "to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard." *Id.* at 873-74, 103 S.Ct. at 2740-41.

After noting the function, as described above, of an aggravating circumstance under the Georgia capital scheme, the Supreme Court in *Zant* concluded that the existence of two valid aggravating circumstances served the constitutional requirement of narrowing the class of persons eligible for the death penalty despite the consideration by the jury of a third aggravating circumstance – that the defendant had "a substantial history of serious

assaultive criminal convictions" – which had been declared unconstitutionally vague. *Id.* at 879, 103 S.Ct. at 2744. Thus, concluding that the defendant Stephens had already crossed the threshold into the class of individuals eligible for the death penalty by virtue of the two valid statutory aggravating circumstances found by the jury, the Supreme Court determined that the jury's consideration of the invalid statutory aggravating circumstance in deciding whether to actually impose the death penalty did not amount to constitutional error. The Supreme Court stated that "the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death." *Id.* at 878, 103 S.Ct. at 2743. Thus, despite recognizing the possibility that the labelling of the invalid aggravating circumstance as statutory in Stephens' case might have caused the jury to afford that circumstance greater weight in its sentencing deliberations, the Supreme Court determined the death sentence to be constitutionally valid. *Id.* at 888-89, 103 S.Ct. at 2748-49.

At this point, some observations regarding the *Zant* decision which are important to the instant appeal by Stringer must be made. First, the Supreme Court, in upholding Stephens' death sentence, relied in part on the meaningful appellate review conducted by the Georgia Supreme Court in capital cases to insure that the death penalty is not imposed in a disproportionate, arbitrary, or capricious fashion. *Id.* at 890, 103 S.Ct. at 2749. Additionally, and of considerable import, is the fact that the Supreme Court in *Zant* established that the function of an aggravating circumstance in a capital scheme is critical to

the validity of a death sentence imposed pursuant to the consideration by the sentencer of an invalid aggravating circumstance. In this regard, the Supreme Court in the final paragraph of its opinion in *Zant*, purposefully declined to intimate an opinion as to the following issue:

Finally, we note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.

Id. at 890, 103 S.Ct. at 2750.

Recently, in the Tenth Circuit's en banc treatment of *Cartwright v. Maynard*, that court confronted the above question reserved by the Supreme Court in *Zant* regarding the effect of an invalid aggravating circumstance on the validity of a death sentence imposed pursuant to a capital sentencing scheme under which a jury is required to balance statutory aggravating and mitigating circumstances in exercising its discretion to impose the death penalty. *Maynard*, 822 F.2d 1477. In the Tenth Circuit's en banc *Maynard* opinion, a case in which the court was reviewing the validity of a death sentence imposed under Oklahoma law, the Tenth Circuit engaged in an extensive discussion of the Supreme Court's pronouncements addressing the effect of a jury's consideration of an invalid aggravating circumstance on the validity of a death sentence. The Tenth Circuit *Maynard* court observed that the Supreme Court decisions in this area

"leave open the question of whether a sentencing authority that must weigh all statutory factors [aggravating and mitigating] may consider constitutionally invalid aggravating circumstances." *Maynard*, 822 F.2d at 1482 (quoting Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 Cornell L. Rev. 1629, 1981 (1984)). In resolving the above question in *Maynard*, the Tenth Circuit applied the language of the Supreme Court in *Zant* regarding the function of an aggravating circumstance under a capital scheme and the reason a particular aggravating circumstance is invalid.

On the function of an aggravating circumstance under Oklahoma law, the en banc *Maynard* court stated that "[t]he purpose of an aggravating circumstance in the Oklahoma statute is decidedly different from the purpose of an aggravating circumstance in the Georgia statute considered in *Zant*." *Id.* at 1480. Pursuant to Oklahoma law, any first degree murder is eligible to be classified as a capital murder and thus, the purpose of an aggravating circumstance under the Oklahoma capital sentencing scheme is not to narrow the class of persons eligible to receive the death penalty. Instead, "Oklahoma uses an aggravating circumstance to guide the discretion of the sentencer in determining whether the death penalty should be imposed for a particular murder." *Id.* at 1480; Okla.Stat. Ann. Title 21, § 701.10 (West 1983). Following the conviction of a defendant for first degree murder in Oklahoma, a jury is required to balance all of the statutory aggravating circumstances found against all of the mitigating circumstances found in determining whether or not to impose the death penalty. Okla.Stat. Ann. Title 21, § 701.11 (West 1983). As a result, the effect of the

consideration by the jury of an invalid aggravating circumstance under Oklahoma's capital sentencing scheme, as compared to the Georgia scheme, is a greater likelihood that the death penalty will be imposed in an arbitrary and capricious manner as "[a]n aggravating circumstance in Oklahoma plays a critical role in guiding the discretion of the sentencer who must decide whether a particular murder merits life imprisonment or death for the defendant." *Maynard*, 822 F.2d at 1482.

In addressing the second aspect of the Supreme Court's analysis in *Zant* regarding the reason a particular aggravating circumstance is invalid, the en banc *Maynard* court noted that the Supreme Court has previously upheld death sentences where an invalid aggravating circumstance was considered by the jury and that aggravating circumstance was invalid only under state, not federal, law. See *Wainwright v. Goode*, 464 U.S. 78, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983); *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). Particularly relevant to the instant appeal by Stringer is the ruling by the Supreme Court in *Wainwright v. Goode*, wherein the Supreme Court emphasized the curative effect of the appellate review conducted by the Florida Supreme Court of the death sentence imposed in that case. In *Goode*, the Florida Supreme Court independently rebalanced only the valid aggravating circumstances found by the jury against the mitigating circumstances to determine if the death sentence was valid. In upholding the death sentence imposed in *Goode*, the Supreme Court stated that there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered [an

invalid aggravating circumstance]." *Goode*, 464 U.S. at 86-87, 104 S.Ct. at 383-84.

In *Maynard*, the Tenth Circuit distinguished the defendant Cartwright's case from that of the invalid aggravating circumstances at issue in *Barclay* and *Goode* on the basis that the invalid aggravating circumstance in Cartwright's case – the identical "heinous, atrocious, or cruel" circumstance at issue in the instant appeal by Stringer – was invalid not under state law, but under federal constitutional law. *Maynard*, 822 F.2d at 1480. Further, the Tenth Circuit in *Maynard* noted that Oklahoma courts do not provide for a method of appellate review whereby the Oklahoma appellate courts may independently reweigh only the valid aggravating and mitigating circumstances in a capital case so as to cure on appeal a sentencer's consideration of an invalid aggravating circumstance. *Id.*

On the basis of the above observations regarding the function of an aggravating circumstance in Oklahoma and the reason the especially heinous aggravating circumstance was invalid, the Tenth Circuit ultimately concluded that:

[R]eliance upon an aggravating circumstance that is invalid under the federal constitution could affect the balance struck by the sentencer. The improper reliance is not corrected by the state appellate review process and is not a matter of state law beyond the review of a federal court in a habeas corpus proceeding. A death sentence that is imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the Eighth and Fourteenth

Amendments. We therefore must consider Cartwright's allegation that Oklahoma's application of the 'especially heinous, atrocious, or cruel' aggravating circumstance in this case was unconstitutionally vague.

Id. at 1482-83. After reaching the above conclusion, the Tenth Circuit then proceeded to hold that the especially heinous aggravating circumstance as applied pursuant to Oklahoma law was in fact unconstitutionally vague under the Federal Constitution. *Id.* at 1483-91. The Tenth Circuit reasoned that it was therefore presented with the question of whether or not the court could sua sponte apply a limiting construction of the especially heinous aggravating circumstance to the facts of Cartwright's case so as to cure any error by the jury in considering the unconstitutional aggravating circumstance. Observing that Oklahoma had adopted no such limiting construction, the Tenth Circuit determined that the fashioning of such a saving construction must be made by the State in the first instance and accordingly, remanded Cartwright's case to the state courts for a redetermination of his sentence. *Id.* at 1492.

Thereafter, the Supreme Court, reviewing the en banc decision of the Tenth Circuit in *Maynard*, affirmed the holding by the Tenth Circuit that the language of the especially heinous aggravating circumstance was unconstitutionally vague under the eighth and fourteenth amendments. *Maynard*, ___ U.S. ___, 108 S.Ct. at 1859. However, the Supreme Court did not comment on the further conclusion by the Tenth Circuit that a death sentence imposed pursuant to a balancing that included consideration of an unconstitutional aggravating circumstance must be vacated under the eighth and fourteenth

amendments. Instead, the Supreme Court in *Maynard*, recognizing, as did the Tenth Circuit, that Oklahoma had no provision for curing the consideration of an invalid aggravating circumstance on appeal, remanded Cartwright's case to the Oklahoma state courts for a redetermination of the appropriate sentence. In this regard, the Supreme Court stated that:

It is true that since the decision of the Court of Appeals, the Oklahoma Court of Criminal Appeals has restricted the heinous, atrocious, or cruel aggravating circumstance to those murders in which torture or serious physical abuse is present. At the same time, that court decided that it would not necessarily set aside a death penalty where on appeal one of several aggravating circumstances has been found invalid or unsupported by the evidence.

What significance these decisions of the Court of Criminal Appeals have for the present cases is a matter for the state courts to decide in the first instance.

Maynard, ___ U.S. ___, 108 S.Ct. at 1860 (citations omitted).

Turning to the facts of the case sub judice, it is observed that the function of an aggravating circumstance under the Mississippi capital sentencing scheme constitutes a hybrid between that of the function of the aggravating circumstance under the Georgia capital scheme reviewed in *Zant* and the aggravating circumstance under the Oklahoma capital scheme reviewed in *Maynard*. Under the Mississippi scheme, a statutory aggravating circumstance serves not only to narrow the class of persons eligible for the death penalty, but also to guide the discretion of the sentencer in deciding whether

or not to impose the death penalty. Regarding the latter, as required of a jury in Oklahoma, a jury in Mississippi is required to weigh statutory aggravating circumstances against mitigating circumstances in deciding whether to impose the death penalty once a defendant has been convicted of a capital offense. Miss.Code Ann. § 99-19-103 (Supp.1987). Thus, like the aggravating circumstance in Oklahoma, the aggravating circumstance in Mississippi's capital sentencing scheme "plays a critical role in guiding the discretion of the sentencer" in determining whether an individual defendant is sentenced to life or death. Further, as in Oklahoma, Mississippi provides no method for curing on appeal the improper consideration by a sentencer of an unconstitutional aggravating circumstance.¹ As a result, reliance on an unconstitutional

¹ The majority opinion points to the fact that the Mississippi Supreme Court, on appeal, reviews whether or not a sentence of death is imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the evidence is sufficient to support the jury's finding on each statutory aggravating circumstance; and whether the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. *Majority Opinion* at slip opinion p. 1303, at p. 1114. This type of appellate review, however, is not sufficient to cure on appeal the consideration by a sentencer of an invalid aggravating circumstance in weighing statutory aggravating and mitigating circumstances to determine whether or not to impose the death penalty on a particular defendant. Rather, as recognized by the U.S. Supreme Court in *Wainwright v. Goode*, the type of appellate review which would have a curative effect in such a situation is that review pursuant to which an appellate court independently rebalances only the valid aggravating circumstances found by the sentencer against the mitigating circumstances to determine if the death sentence is valid. *Goode*, 464

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aggravating circumstance by a jury in Mississippi could affect the delicate balance struck by the sentencer in deciding whether or not to impose the death penalty. I am persuaded, therefore, that this Court, like the Tenth Circuit in *Maynard*, must consider Stringer's assertion that the "heinous, atrocious, or cruel" circumstance as applied under Mississippi law is unconstitutionally vague.

On this question, it is noted that, in light of the recent holding by the Supreme Court in *Maynard* that the especially heinous aggravating circumstance is facially unconstitutional, any further inquiry in this area is limited to determining whether or not Mississippi applies a limiting construction of the especially heinous aggravating circumstance in reviewing a death sentence on appeal. In

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U.S. at 86-87, 104 S.Ct. at 383-84. In fact, in *Cartwright v. Maynard*, the Tenth Circuit en banc rejected the proportionality review conducted by the Oklahoma Court of Criminal Appeals in that case as a justification for upholding the validity of the death sentence where the sentencer considered an unconstitutional aggravating circumstance. In doing so, the Tenth Circuit noted that Supreme Court decisions do not in any manner suggest "that a proportionality review [illegible] serve as an independent basis for upholding a death sentence imposed after reliance upon an unconstitutional aggravating circumstance." *Cartwright*, 822 F.2d at 1481 n. 3.

Therefore, since Mississippi, like Oklahoma, does not provide a method for curing on appeal the improper consideration by a sentencer of an unconstitutional aggravating circumstance the appellate review which was conducted by the Mississippi Supreme Court of Stringer's death sentence in the instant case cannot cure the jury's reliance upon the unconstitutional especially heinous aggravating circumstance in arriving at its decision to sentence Stringer to death.

this connection, this Court, in *Johnson v. Thigpen*, 806 F.2d 1243, noted that the Mississippi Supreme Court, in *Coleman v. State*, 378 So.2d 640 (Miss.1979), had indeed adopted a limiting construction of the especially heinous aggravating circumstance to be applied in conducting appellate review of death sentences. However, in reviewing Mississippi's actual application of the limiting construction adopted in *Coleman*, this Court in *Johnson* concluded that:

[T]he Mississippi Supreme Court has not consistently applied its *Coleman* limiting construction of the especially heinous aggravating circumstance. The limiting construction we found in *Gray [v. Lucas]*, 677 F.2d 1086 (5th Cir.1982) had been adopted in *Coleman* appears now to be more honored in breach than observance.

Johnson, 806 F.2d at 1247. Despite recognizing that the Mississippi Supreme Court no longer applies a limiting construction to the especially heinous aggravating circumstance, this Court upheld the death sentence imposed in *Johnson* as constitutionally permissible on the basis that the remaining valid aggravating circumstances serve the constitutional requirement of narrowing the class of persons eligible for the death penalty under the Mississippi capital sentencing scheme. *Id.* at 1248. Further, the Court in *Johnson* concluded that even if error was present due to the broadened construction of the especially heinous aggravating circumstance, it was error under Mississippi, and not federal law, and thus, an error of state law not cognizable on habeas corpus review. *Id.* at 1249.

Since *Johnson*, however, the Supreme Court has decided *Maynard v. Cartwright*. *Maynard* now teaches that the especially heinous aggravating circumstance is

unconstitutionally vague in violation of federal, not state law. Therefore, any error in this regard is cognizable by this court on habeas corpus review. Moreover, as observed by this Court in *Johnson*, the Mississippi courts no longer apply a limiting construction to the especially heinous aggravating circumstance to cure on appeal the sentencer's reliance on an unconstitutional aggravating circumstance in determining whether to impose the death penalty. *Id.* at 1247. Relying on the fact that "the Oklahoma Court of Criminal Appeals would not attempt to save the death penalty when one of several aggravating circumstances found by the jury was found invalid or unsupported by the evidence," the Supreme Court in *Maynard* declined to adopt such a saving construction of the especially heinous aggravating circumstance in the first instance and instead deferred to the state courts to rule initially on the issue. *Maynard*, ___ U.S. ___, 108 S.Ct. at 1860. This Court should do likewise.

Returning full circle to the point first noted by this dissent, this Court is now bound by the recently issued opinion of this Court in *Edwards v. Scroggy*, which rejected *Maynard* as a basis for habeas corpus relief concluding that Mississippi law is clear that one invalid aggravating circumstance will not suffice to overturn a death penalty where other valid aggravating circumstances remain. Setting aside for the moment the fact that the *Edwards* Court did not address the critical issue of the validity of a death sentence imposed pursuant to a balancing which includes consideration of an unconstitutional aggravating circumstance, the *Edwards* ruling does not foreclose Stringer's argument on this issue in the instant appeal. Stringer's argument is not foreclosed due to the fact that Mississippi

law has created at least one exception to the general rule stated in *Edwards* regarding the effect of a sentencer's consideration of an invalid aggravating circumstance on the validity of a death sentence. Specifically, the Mississippi Supreme Court has, at least on one occasion, stated that it would "eschew" a harmless error analysis in a situation where a prosecutor has argued an invalid aggravating circumstance to a jury as a justification for imposing the death penalty. *Johnson v. State*, 511 So.2d 1333, 1338 (Miss.1987), *rev'd on other grounds*, ___ U.S. ___, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). In *Johnson*, the prosecutor argued to the jury as a justification for imposing the death penalty a previous conviction of Johnson which was later determined to be invalid. In rejecting a harmless error analysis under the facts of the *Johnson* case, the Mississippi Supreme Court relied on the fact that the "district attorney argued this particular aggravating circumstance as a reason to impose the death penalty." *Id.* This decision by the Mississippi Supreme Court to refrain from applying a harmless error analysis was cited with approval last term by the Supreme Court in *Johnson v. Mississippi*, ___ U.S. ___, 108 S.Ct. 1981, 1989 n. 8, 100 L.Ed.2d 575 (1988).

In the instant case, as in *Johnson*, the prosecutor vigorously argued as a justification for imposing the death sentence on defendant James Stringer the fact that the instant crime was especially heinous, atrocious, and cruel. In this regard, the prosecutor stressed repeatedly to the jury that if they should find only one aggravating circumstance to outweigh any mitigating circumstances, then the verdict should be the death penalty. Proceeding in such a fashion, the prosecutor then apparently showed

photographic slides of the crime to the jury, describing in detail the facts of the murders and asking of the jury "Is that atrocious? Is that cruel?" This argument by the prosecutor certainly raises a question as to whether, under Mississippi law, Stringer would be entitled to a resentencing due to the jury's consideration of the unconstitutionally vague especially heinous aggravating circumstance. Moreover, it is highly suspect that the Mississippi capital sentencing scheme continues to channel the sentencer's discretion by "clear and objective standards" where an unconstitutionally vague aggravating circumstance is vigorously argued to the jury as a justification for imposing the death penalty. See *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S.Ct. 1759, 1765, 64 L.Ed.2d 398 (1980). Therefore, contrary to the conclusion reached by the majority today, this Court's decision in *Edwards* does not foreclose Stringer's request for habeas corpus relief in the instant appeal. Mississippi law is not well settled on the aspect of a jury's consideration of an invalid aggravating circumstance in a capital sentencing proceeding where that circumstance has been vigorously argued to the jury as a basis for the death penalty. Accordingly, I would remand the instant proceeding to the state courts for a redetermination of Stringer's sentence.

As a final note, I would harken back to the previously mentioned fact that this court has consistently declined to recognize or address the vital issue of the effect on the validity of a death sentence of a jury's consideration of an unconstitutional aggravating circumstance pursuant to a capital sentencing scheme which requires a sentencer to *balance* all statutory aggravating circumstances against all mitigating circumstances in

deciding whether or not to impose the death penalty. For the reasons set forth by the Tenth Circuit in its en banc opinion in *Maynard* and discussed more fully above, I would conclude, and urge this Court to also conclude, that the consideration of an unconstitutional aggravating circumstance under a capital sentencing scheme which requires a jury to balance aggravating and mitigating circumstances and which is not effectively cured on appeal must be vacated under the eighth and fourteenth amendments. It is absolutely imperative that a death sentence not be imposed pursuant to a sentencing process which fails to protect against the imposition of our most severe and final punishment in an arbitrary or capricious fashion.

United States Court of Appeals,
Fifth Circuit.

July 30, 1990.

James R. STRINGER,
Petitioner-Appellant,

v.

Charles J. JACKSON, Interim Commissioner,
Mississippi Department of Corrections, et al.
Respondents-Appellees.

No. 88-4126.

Appeal from the United States District Court for the Southern District of Mississippi; William Henry Barbour, Jr., Judge. ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES, ___ U.S. ___, 110 S.Ct. 1800, 108 L.Ed.2d 931

Before REAVLEY, JOHNSON and DAVIS, Circuit Judges.

REAVLEY, Circuit Judge:

This cause has been remanded to us by the Supreme Court for reconsideration in light of *Clemons v. Mississippi*, 494 U.S. ___, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). The problem corresponds to the issue treated in *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). The Attorney General of Mississippi objects to our application of these two cases here on the ground that Stringer's conviction was final prior to either decision, and therefore any claim on that ground is barred by *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). That objection is well taken.

Stringer's conviction was final on February 19, 1985 when the Supreme Court denied his petition for writ of certiorari directed at his conviction and sentence. *Stringer v. Mississippi*, 469 U.S. 1230, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1985). A panel of the Fifth Circuit has recently held that claims raised under *Clemons* and *Maynard* are not available to a habeas petitioner whose conviction was final prior to these decisions, because they constitute a new rule of law under *Teague*. *Smith v. Black*, 904 F.2d 950 (5th Cir. 1990).

We therefore reinstate our previous judgment. *Stringer v. Jackson*, 862 F.2d 1108 (5th Cir. 1988). The judgment of the district court denying the writ is **AFFIRMED**.

Supreme Court of the United States

No. 90-6616

JAMES R. STRINGER,

Petitioner

v.

LEE ROY BLACK, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI to the United
States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed
herein in forma pauperis and of the petition for writ of
certiorari, it is ordered by this Court that the motion to
proceed in forma pauperis be, and the same is hereby,
granted; and that the petition for writ of certiorari be, and
the same is hereby, granted limited to Question 3 pre-
sented by the petition.

May 13, 1991

7
No. 90-6616

Supreme Court U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

JAMES R. STRINGER,
v. *Petitioner,*

LEE ROY BLACK, COMMISSIONER, MISSISSIPPI
DEPARTMENT OF CORRECTIONS, *et al.,*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the "rule" applied in *Maynard v. Cartwright* is new?

2. Whether the "rule" applied in *Clemons v. Mississippi* requiring a state appellate court to review the facts and circumstances of the individual case to cure constitutional error in a capital sentencing proceeding is new?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-6616

JAMES R. STRINGER,
v. *Petitioner,*

LEE ROY BLACK, COMMISSIONER, MISSISSIPPI
DEPARTMENT OF CORRECTIONS, *et al.,*
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit rendered on July 30, 1990, is reported at *Stringer v. Black*, 909 F.2d 111 (5th Cir. 1990), and is reprinted in the Joint Appendix at J.A. 68.

The majority and dissenting opinion of the United States Court of Appeals for the Fifth Circuit rendered in 1988 is officially reported at *Stringer v. Jackson*, 862 F.2d 1108 (5th Cir. 1988), and is reprinted in the Joint Appendix at J.A. 26.

JURISDICTION

Jurisdiction of this Court rests upon 28 U.S.C. Section 1254(1). The judgment and opinion of the Fifth Circuit was rendered on July 30, 1990. Petitioner filed

a timely petition for certiorari which this Court granted on May 13, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions:

a. The Eighth Amendment to the United States Constitution, which provides in pertinent part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

b. The Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Record and Proceedings in the Trial Court

On June 21, 1982, Ray McWilliams and his wife, Nell McWilliams, were discovered in their Jackson, Mississippi, home, dead of gunshot wounds. Police eventually arrested Mike Meddars and Rhonda Brock, after Meddars had been picked up in another part of the state for assaulting Brock. Meddars admitted his and Brock's involvement in the murders in Jackson, and after negotiating a deal with the police which protected him and Brock from the gas chamber, blamed James Stringer, James's son Jimbo Stringer, and John Mack Parker for actually committing the murders in the course of a robbery attempt.

The State's theory that James Stringer led the others in a robbery of Ray McWilliams was presented at trial almost exclusively through the testimony of coindictes Brock and Meddars. According to Meddars, the group met to work out a plan for the robbery. (T-717). Dur-

ing the planning, the group was drinking heavily and smoking marijuana; James Stringer was the most intoxicated of the group, according to Meddars. (T-729). Meddars drove the group past the house before the robbery to assist the planning. The plan was for Stringer and Brock to go to the McWilliams' home at night and get invited inside on the pretext that Brock needed cash in a hurry and was willing to sell jewelry. Once they were inside, Ray McWilliams would be forced to tell the robbers where he kept his cash. After the robbery, the plan was to cut the victims' throats so as to avoid gunshots, because they "all knew" a policeman lived nearby. (T-719). Meddars drove the car used in the crime and provided the bandanna which was to be used to wipe fingerprints. (T-720).

Events did not unfold according to this plan. According to Brock, Ray McWilliams got into a struggle with James Stringer. Mack Parker then put a pistol to McWilliams head and said "you are a dead man," pulling the trigger and killing McWilliams with a single gun shot. Nell McWilliams came into the kitchen, and Stringer's son shot her in the back of the head with a shotgun, killing her instantly. (T-513). The pathologist, Dr. Rodrigo Galvez, testified as a witness for the State that Nell McWilliams suffered no "defense wounds." (T-513-514). According to witnesses, between the sound of the first shot and the sound of the last, only eight to ten seconds elapsed. (T-468). The five hastily left the home without taking anything and drove off in Meddars' car. James Stringer was unaware Mrs. McWilliams had been killed until the group was back in the car and driving off.

In the summer of 1982, when the crime occurred, James Stringer was fifty years old (T-1133). He had been married to the same wife for twenty-six years and had four children (T-1131). James had a ninth grade education in Mississippi schools (T-1131-32). At a young age, James volunteered for service in the United States Army during the Korean War. He served in a front-line regiment and

was decorated for heroism during the war (T-1132). He reenlisted in the Army and served for a total of seven years before receiving an honorable discharge (T-1132). James thereafter established himself as a businessman in Jackson, Mississippi, where he lived from 1961 until his arrest in 1982 (T-1132; 1138-39). For more than fifteen years, he owned and operated a used car business. (T-1133). He converted his car lot to a gold and silver exchange. In this business located in downtown Jackson, James had himself been the victim of armed robberies on many occasions (T-1138-39).

In 1979, James became emotionally devastated when his niece was murdered (T-1135). He attempted to investigate the murder by himself as a means of coping with this trauma and during this effort found himself in several fights which resulted in misdemeanor convictions (T-1135). Prior to his capital murder conviction in this case, James had no felony convictions and no significant history of prior criminal activity. (T-1137).

Before the events giving rise to this prosecution, James Stringer's physical and financial conditions also took sharp turns for the worse. His hands were crushed in an accident and he was unable to operate his business (T-1141-1164). The medical bills for the necessary surgery totalled at least ten to fifteen thousand dollars (T-1141-42). At the end of May 1982, more misfortune befell James Stringer when he suffered an automobile accident in which he reinjured his back. (T-1142, 1158-59). James suffered chronic and debilitating pain from these injuries. (T-1141, 1159, 1161).

James was tried and convicted solely for the capital murder of Nell McWilliams. The trial court instructed the jury that if it found Stringer knowingly committed "any act which is an ingredient of the crime of capital murder or immediately connected with it, or leading to its commission, then and in that event, [the jury] should find the Defendant guilty of capital murder." (T-1412).

The instructions permitted the jury to find James Stringer guilty of capital murder as an accessory, without findings of premeditation and deliberation, malice aforethought, or intent to kill (T-1402, 1412).

Mississippi's sentencing scheme requires jurors to find that statutorily defined aggravating circumstances are not outweighed by mitigating circumstances before imposing a sentence of death. The jury is required to specify its findings of aggravating circumstances, but not its findings of mitigating circumstances. Only evidence related to statutory aggravating circumstances found unanimously by the jury can be considered in the weighing process.¹ See *Coleman v. State*, 378 So.2d 640, 648 (Miss. 1979).

¹ Consistent with Mississippi law, James Stringer's jury was instructed in the following manner:

To return the death penalty, you must unanimously find from the evidence, beyond a reasonable doubt, that any aggravating circumstance(s)—those which tend to warrant the death penalty—outweigh the mitigating circumstance(s)—those which tend to warrant the less severe penalty of life imprisonment.

Consider only the following elements of aggravation in determining whether the death penalty should be imposed. Before you can return the death penalty in this case, you, the jury, must unanimously find from the evidence in this case, beyond a reasonable doubt, that one or more of the following aggravating circumstance(s) exist in this case

If you so find, then you must proceed to weigh any such aggravating circumstance(s) against any existing mitigating circumstance(s) to determine whether the aggravating circumstance(s), if any, outweigh the mitigating circumstance(s), if any

If you unanimously find from the evidence any one or more of the mitigating circumstance(s) listed above exists, and, if after weighing the mitigating circumstance(s) and the aggravating circumstance(s), one against the other, you further find unanimously from the evidence beyond a reasonable doubt that the aggravating circumstance(s) outweigh the mitigating circumstance(s) and the death penalty should be imposed, your verdict shall be written on a separate sheet of paper, shall be signed by your foreman, and shall be in the following form

J.A. 10-12.

The trial judge instructed the jury to consider three "aggravating circumstances". The first aggravating circumstance submitted to the jury was that "the Defendant contemplated that life would be taken and/or the capital murder was intentionally committed and the Defendant shared in that intent, while the defendant was engaged in an attempt to commit a robbery; and was committed for pecuniary gain." The second aggravating circumstance submitted to the jury that "the capital murder was committed for the purpose of avoiding or preventing the detection and lawful arrest of James R. Stringer, the Defendant." (T-1431-1432).

Finally, the jury was permitted to consider the aggravating circumstance, that "the capital murder was especially heinous, atrocious or cruel". (T-1432). The trial court gave the jury no guidance as to what that phrase meant.

This broadly phrased and utterly undefined aggravating circumstance figured prominently in the prosecutor's final argument to the jury. Indeed, the prosecutor vigorously argued that the jury should view the especially heinous, atrocious and cruel nature of the crime as the primary justification for imposing the death sentence. (T-1370-71, 1373-74, 1377-78). Driving his point home, the prosecutor projected photographic slides of both corpses to the jury and asked the jurors, "Is that atrocious? Is that cruel?"

The jury returned a verdict of death after finding each of the three aggravating circumstances that were submitted.²

² Of the original group accused by Meddars and Brock, James Stringer is the only one on death row. Mike Meddars, who drove the car, carried a .38 pistol, provided the bandanna and suggested the knife as a means of murdering Mr. and Mrs. McWilliams, was permitted to plead guilty to manslaughter and received a twenty-year sentence in exchange for his testimony. Rhonda Brock, who carried a .25 automatic pistol (T-730), who went with James Stringer to the door of the McWilliams' house and tried to trick her

B. Proceedings on Direct Appeal

On direct appeal the Mississippi Supreme Court affirmed James's conviction and death sentence. It summarily reviewed the jury's findings of aggravating circumstances, stating only that the "evidence fully supports the jury's finding of statutorily required aggravating circumstances." *Stringer v. State*, 454 So.2d 468, 479 (Miss. 1984). "[A]s required by statute," it considered "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor" and concluded that it was not because "a study of the record could not reveal evidence stronger for [the] death penalty." *Id.* at 478. This conclusion appears to rest primarily on the consideration that the killings of Mr. and Mrs. McWilliams constituted "acts of violence hard to be imagined by the average citizen." *Id.* at 471. The portion of the opinion summarizing the conclusion recites various features of the crime without analyzing the particular significance of any of them, emphasizing only that James Stringer's level of involvement in the planning and conduct of the armed robbery warrants "the affirmance of appellant's death penalty . . . , even though he did not actually pull the trigger of the weapon that caused the death." *Id.* at 479. None of the mitigating evidence shown by the record, other than the fact that James Stringer did not personally kill either victim, is considered in the Mississippi Supreme Court opinion.

On February 19, 1985, this Court denied *certiorari*. *Stringer v. Mississippi*, 469 U.S. 1230.

way into the house to commit the robbery and murder, also received a twenty-year sentence under her plea agreement. John Mack Parker, who shot and killed Ray McWilliams, pled guilty and received a life sentence. Jimbo Stringer, who shot and killed Nell McWilliams with a shotgun, was tried, convicted, and sentenced to life in prison by a jury. He also was tried for his part in the murder of Ray McWilliams; that case was resolved with a negotiated life sentence.

C. Post-Appeal Proceedings

James Stringer was denied post-conviction relief by the Mississippi Supreme Court. *Stringer v. State*, 485 So.2d 274 (Miss. 1986). A Petition for Writ of Habeas Corpus was filed with the United States District Court for the Southern District of Mississippi raising a *Godfrey* challenge to the application of the Mississippi especially heinous, atrocious or cruel aggravating circumstance as a basis for his death sentence. The United States District Court denied relief on this claim and all other federal post-conviction claims. *Stringer v. Scroggy*, 675 F.Supp. 356 (S.D. Miss. 1987). The United States Court of Appeals for the Fifth Circuit affirmed the District Court's decision. *Stringer v. Jackson*, 862 F.2d 1108 (5th Cir. 1988), *reh. denied*, 866 F.2d 1417 (1989). The Fifth Circuit relied on its interpretation of a particular Mississippi procedure providing that a death sentence "should be upheld even though an aggravating circumstance is found invalid or unsupported by the evidence, so long as at least one aggravating circumstance remains." *Id.* at 1113. This "automatic affirmance" procedure, *see Clemons v. Mississippi*, 494 U.S. —, —, 110 S.Ct. 1441, 1450 (1990) (characterizing Mississippi procedure as "[a]n automatic rule of affirmance"), was not invoked by the Mississippi courts in James Stringer's case.

This Court vacated the decision below, and remanded the case for further consideration in light of *Clemons v. Stringer v. Black*, — U.S. —, 110 S.Ct. 1800 (1990). On remand, the Fifth Circuit reinstated its previous judgment in a summary opinion stating that "[a] panel of the . . . Circuit has recently held that claims raised under *Clemons* and *Maynard* are not available to a habeas petitioner whose conviction was final prior to these decisions, because they constitute a new rule of law under *Teague* [*v. Lane*, 489 U.S. 288 (1989)]." *Stringer v. Black*, 909 F.2d 111 (5th Cir. 1990).

The Fifth Circuit earlier concluded in *Smith v. Black*, 904 F.2d 950 (5th Cir. 1990), that this Court's decision

in *Clemons v. Mississippi* finding Mississippi's "automatic affirmance" rule unconstitutional should not be given retroactive effect. 904 F.2d at 982-86.

SUMMARY OF ARGUMENT

This Court announced no new constitutional rule in deciding *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Clemons v. Mississippi*, 494 U.S. —, 110 S.Ct. 1441 (1990). To the extent that the decision of the Fifth Circuit Court of Appeals denying James Stringer habeas relief is premised on a contrary view, it must be reversed.

It is unclear whether the Fifth Circuit meant to hold in this case that *Maynard v. Cartwright*, standing alone, is nonretroactive in habeas proceedings under *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. No other court takes the view that *Cartwright* made new law, and for good reason. Since 1976, it has been a settled rule of Eighth Amendment jurisprudence that an aggravating circumstance phrased so vaguely that it provided inadequate guidance to the sentencer will not pass constitutional muster. The principle was stated in *Gregg v. Georgia*, 428 U.S. 153 (1976), and *Proffitt v. Florida*, 428 U.S. 242 (1976), and was applied in *Godfrey v. Georgia*, 446 U.S. 420 (1980), to condemn an aggravating circumstance couched only in terms of the "outrageously or wantonly vile, horrible and inhuman" nature of the killing. *Id.* at 428-29. *Cartwright* involved no extension of this old law, but rather applied it to facts slightly but not materially different than were at issue in *Godfrey*. In *Cartwright*, the aggravating circumstance was defined only in terms of the "especially heinous, atrocious or cruel" nature of the killing. Without some further, properly delimiting construction, such language could not pass the settled Eighth Amendment test.

Clemons v. Mississippi likewise announced no new constitutional rule and therefore applies to habeas corpus. Indeed, this Court applied *Clemons* in *Parker v. Dugger*,

498 U.S. —, 111 S.Ct. 731 (1991), to the benefit of a habeas petitioner whose conviction became final, like James Stringer's, in 1985. Were *Clemons* new law, the Court would not have applied it in *Parker*; new rules are neither announced nor applied in habeas corpus, and any questions regarding retroactivity are addressed by the Court as a threshold issue. These requirements exist because they are essential to satisfy one of *Teague*'s underlying principles—that similarly situated individuals receive equal treatment. The petitioner in *Parker* and James Stringer are in all pertinent respects similarly situated. The same rules must be applied to both men.

This Court was right to apply *Clemons* retroactively in *Parker* because *Clemons* states no new rule. *Clemons* permits an appellate court to reweigh aggravating and mitigating circumstances or perform a harmless error test when, as in this case, the sentencer in a "weighing" jurisdiction has considered and relied on an unconstitutional aggravating circumstance. What *Clemons* condemned, however, is Mississippi's rule of "automatic affirmance" whenever the sentencer also found another valid aggravating circumstance—the rule of "automatic affirmance" which the Fifth Circuit respected in this case. A rule of "automatic affirmance" is unconstitutional, *Clemons* held, not because it violates a new rule or principle. It is unconstitutional because it is "invalid under *Lockett v. Ohio* and *Eddings v. Oklahoma* for it [does] not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." *Clemons*, 494 U.S. at —, 110 S.Ct. at 1450 (citations omitted).

It has long been the rule that capital sentencing decisions must rest on an individualized determination, regardless of by whom that determination is made. If the decision is to rest on a state appellate court's asserted "cure" of constitutional error occurring at the trial level,

then the state appellate court must heed the mitigating circumstances present in the case. That was held in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Later cases—*Zant v. Stephens*, 462 U.S. 862 (1983), *Barclay v. Florida*, 463 U.S. 939 (1983), and *Wainwright v. Goode*, 464 U.S. 78 (1983), similarly insisted that state appellate courts may not disregard the individual facts of the case when deciding to affirm a death sentence returned by a sentencer who relied on an invalid aggravating circumstance. What has always been of fundamental importance, even before James Stringer's case became final, "is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Barclay*, 463 U.S. at 958 (quoting *Zant*, 463 U.S. at 879) (emphasis in original). An "automatic affirmance" rule, by definition, ignores the individual facts and circumstances of a case and disregards mitigating circumstances entirely. As *Clemons* held, it violates constitutional law that was settled long before James Stringer's appeal reached the Mississippi Supreme Court.

Mississippi's curious and arbitrary procedure of ignoring the effect of constitutional defects on the sentencer's life or death determination finds little or no support from the practice of its sister states. State courts were aware, prior to *Clemons*, of their obligation to determine the effect of constitutional error on the sentencer's determination before sustaining a death sentence. Therefore, nothing in *Clemons* broke new ground or imposed a new obligation on the States.

ARGUMENT

I. THE "RULE" APPLIED IN *MAYNARD v. CARTWRIGHT* IS NOT NEW

James Stringer's sentencing jury was instructed that it could base a death sentence on a finding of the statutory aggravating circumstance that "the capital murder was especially heinous, atrocious or cruel." This language from the Mississippi statute, Miss. Code Ann. Section 99-19-101(5)(h), was not defined, limited, or explained in any way by the trial court. This instruction violated the fundamental tenet of Eighth Amendment jurisprudence that capital sentencers be adequately guided in their deliberations. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. *Gregg v. Georgia*, 428 U.S. 153 (1976), reaffirmed this holding:

[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Id. at 189 (opinion of Stewart, Powell and Stevens, J.J.); accord *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (plurality opinion).

In 1976, this Court informed state courts that they must construe the "especially heinous, atrocious or cruel" aggravating circumstance narrowly so as to provide adequate guidance to the sentencer. *Gregg*, 428 U.S. at 201; *Proffitt v. Florida*, 428 U.S. 242, 254-56 (1976). In *Proffitt*, this Court approved Florida's "especially heinous, atrocious or cruel" aggravating factor which was "directed only at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.'" *Id.* at 255. "We cannot say that the provision, as so construed, pro-

vides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See *Gregg v. Georgia*, ante, at 200-203." *Id.* at 255-56. (emphasis added).

In *Gregg*, the Court noted that Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance could arguably be applied to "any murder" but approved the Georgia statute on its face. *Gregg*, 428 U.S. at 201. In a footnote in *Gregg*, the Court then cited with approval Florida's narrow construction of the "especially heinous, atrocious or cruel" aggravating circumstance. 428 U.S. at 201 n.52.

By cross-referencing in this manner Florida's "especially heinous, atrocious or cruel" aggravating circumstance with Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating circumstances, this Court appeared to view the two statutory phrases as essentially indistinguishable. Both phrases, the Court held in 1976, could be given a limiting interpretation that was consistent with the requirements of *Furman*, but—at the same time—it clearly warned that neither phrase alone and without delimiting interpretation would satisfy the Eighth Amendment. Indeed, the *Gregg* plurality opinion specifically anticipated both *Godfrey v. Georgia*, 446 U.S. 420 (1980), and *Maynard v. Cartwright*, 486 U.S. 356 (1988), when it wrote: "[a] system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." *Gregg*, 428 U.S. at 195 n.46.

Godfrey applied the rule of *Gregg* that a capital scheme "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" 446 U.S. at 428 (footnotes citing, *inter alia*, *Gregg* omitted).

At issue was whether the language of the aggravating circumstance that the offense was "outrageously or wantonly vile, horrible and inhuman" provided the sentencer those constitutionally requisite "clear and objective standards." As stated, the aggravating circumstance failed the test. The Court reasoned:

there is nothing in [those] words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'

Id. at 428-29. The Court further rejected Georgia's argument that the review by the Georgia Supreme Court cured the error. The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to remedy the jury's consideration of an unconstitutionally vague aggravating circumstance because that court failed to apply its previously recognized limiting construction of the aggravating circumstance.

In 1982, this Court in dictum applied *Godfrey* to Oklahoma's application of the "especially heinous, atrocious or cruel" aggravating circumstance. *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The death sentence in *Eddings* rested on the trial judge's finding that the crime was "heinous, atrocious and cruel" because "designed to inflict a high degree of pain . . . in utter indifference to the rights of Patrolman Crabtree." *Id.* at 108 n.3. While deciding the case on other grounds, the Court stopped to express its "doubt that the trial judge's understanding and application of this aggravating circumstance conformed to that degree of certainty required by our decision in *Godfrey v. Georgia*." *Id.* at 109 n.4.

The state courts similarly understood that the rule of *Godfrey* applied specifically to the "especially heinous, atrocious or cruel" aggravating circumstance, and appre-

ciated this fact well before this Court decided *Cartwright*.³ See, e.g., *Ex Parte Kyzer*, 399 So.2d 330, 333-34 (Ala. 1981); *State v. Sonnier*, 402 So.2d 650, 658-60 (La. 1981); *State v. Pritchett*, 621 S.W.2d 127, 137-39 (Tenn. 1981); *Wilson v. State*, 295 Ark. 682, 685-89, 751 S.W.2d 734, 736-39 (1988); *Stouffer v. State*, 742 P.2d 562, 563-64 (Okla.Crim.App. 1987); *State v. Hamlet*, 312 N.C. 162, 176-77, 321 S.E.2d 837, 845-46 (N.C. 1984); *Hopkinson v. State*, 632 P.2d 79, 153-56 (1981); *People v. Superior Court of Santa Clara County*, 31 Cal.3d 797, 183 Cal.Rptr. 800, 647 P.2d 76 (1982); see also, *State v. Osborn*, 102 Idaho 405, 417-19, 631 P.2d 187, 200-01 (1981) (applying *Godfrey* to the aggravating circumstance "the murder was especially heinous, atrocious, or cruel manifesting exceptional depravity"); *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982) (applying *Godfrey* to the aggravating circumstance "the murder was especially heinous atrocious or cruel or manifested exceptional depravity by ordinary standards of morality and intelligence."); *State v. Gretzler*, 135 Ariz. 42, 50-53, 659, P.2d 1, 9-12 (1983) (applying *Godfrey* to "especially heinous, cruel or depraved" aggravating circumstance); *State v. Wood*, 648 P.2d 71, 85-86 (Utah 1982) (applying *Godfrey* to aggravating circumstance that the homicide involved "ruthlessness and brutality"); *Com. v. Nelson*, 523 A.2d 728 (Pa. 1987) (applying *Godfrey* to the aggravating circumstance "the offense was committed by means of torture.") Even the Mississippi Supreme Court at one point acknowledged that "[a]bsent a requirement that the jury be instructed as to the specific meaning of 'especially

³ According to one commentator, it is appropriate to analyze the various "especially heinous" aggravating circumstances in state death penalty enactments under a single rubric because "even state court judges, in discussing their particular state's 'especially heinous' aggravating circumstances, have tended to ignore the differences between the specific terminology used in the individual state statutes." R. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L. Rev. 941, 943 n.8 (1986).

heinous, atrocious or cruel' the mandate of *Godfrey* is not met." *Mhoon v. State*, 464 So.2d 77, 85 (Miss. 1985).

It was this same rule, drawn from *Furman*, *Gregg* and *Proffitt*, and applied in *Godfrey* and *Eddings*, that this Court again applied in 1988 in *Maynard v. Cartwright*, 486 U.S. 356 (1988). There, the Court forthrightly stated: "*Godfrey* controls this case." 486 U.S. at 363.⁴ And *Godfrey*, the Court observed in *Cartwright*, merely applied the "central tenet of Eighth Amendment law" stating a 'fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.' 486 U.S. at 362.

Cartwright did no more than apply the settled principle of *Godfrey* to a slightly, but not materially, different set of facts, see *Butler*, — U.S. at —, 110 S.Ct. at 1217 ("mere application to a slightly different set of facts" is not a new rule); *Yates v. Aiken*, 484 U.S. 211 (1988) ("mere application" [of *Sandstrom* principle] to a slightly different legal question is not a new rule); cf. *United States v. Johnson*, 457 U.S. 537, 549 (1982) ("[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way."). The *Cartwright* Court found that the language "especially heinous, atrocious or cruel" gave no more guidance than

⁴ To be sure, *Butler v. McKellar*, — U.S. —, —, 110 S.Ct. 1212, 1217 (1990), teaches that expressions like "control" do not automatically preclude a finding that a decision of this Court has announced a new constitutional rule for *Teague* purposes. On the other hand, when the Court states specifically that a precedent is "controlling," one surely cannot conclude that this is simply a disingenuous or naive protestation that the Court is "merely finding law" when it is actually making law.

the "outrageously or wantonly vile, horrible or inhuman" language in *Godfrey*. Moreover, the Oklahoma Court's review of the especially heinous, atrocious or cruel aggravating circumstance was "indistinguishable" from the action of the Georgia Court in *Godfrey*, which failed to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment. Throughout the *Cartwright* opinion, the Court consistently treats the only real issue to be decided as whether Oklahoma decisional law had—as the Tenth Circuit held—failed to delimit Oklahoma's "especially heinous, atrocious or cruel" aggravating circumstance sufficiently to save it from the rule of *Godfrey*. Nowhere does the Court suggest that the constitutional rule of *Godfrey* is being extended or elaborated in the slightest.

Because the rule employed by the Court was identical, and the outcome the same for the same reasons, *Godfrey* dictated *Maynard v. Cartwright*. No subsequent developments in the law set forth in *Godfrey* were necessary to the result in *Cartwright*. See *Sawyer v. Smith*, — U.S. —, —, 110 S.Ct. 2822, 2827 (1990) ("The principle announced in *Teague* serves to ensure that gradual development in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered"). Rather, the precise holding of *Godfrey*, without more, dictated the result in *Cartwright* because there was no material difference between the vague language struck down in *Godfrey* and the vague language struck down in *Cartwright*.

The applicability of *Godfrey* was not open to debate among reasonable minds. See *Butler*, — U.S. at —, 110 S.Ct. at 1217 (rule new if "significant difference of opinion on the part of several lower courts"). Every court to consider the retroactivity of *Maynard v. Cartwright* has reached the conclusion that it was dictated by *Godfrey*. The Eighth Circuit so held in *Newlon v. Armontrout*, 885 F.2d 1328, 1333 (8th Cir. 1989) (*Cartwright* is dictated by *Godfrey* and is therefore not a "new rule"

for purposes of *Teague v. Lane*). The Tenth Circuit so held in *Davis v. Maynard*, 911 F.2d 415, 418 (10th Cir. 1990) (*Godfrey*, decided three years before Davis's conviction became final, clearly dictated the Tenth Circuit's own holding in *Cartwright*, which was affirmed by this Court; Tenth Circuit did not create a new rule under *Teague* and *Penry*). The Fifth Circuit has never clearly addressed this question, and it is uncertain whether it intended to do so in Stringer's case. See *Hill v. Black*, 932 F.2d 369, 373 (5th Cir. 1991) (while leaving open the question of the retroactivity of *Cartwright*, the court concludes, "as did the Eighth Circuit in *Newlon*, that *Maynard* is simply an application of *Godfrey*, rather than a significant extension of it"); *Smith v. Black*, 904 F.2d 950, 983 n.14 (5th Cir. 1990) (leaving open the question concerning the retroactivity of *Cartwright*). *Cartwright* also has been applied retroactively, without explicit analysis of retroactivity, to cases in habeas proceedings by the Fourth, Ninth and Eleventh Circuits. See *Coleman v. Thompson*, 895 F.2d 139, 147 (4th Cir. 1990); *Creech v. Arave*, 928 F.2d 1481, 1491-1492 (9th Cir. 1991); *Lindsey v. Thigpen*, 875 F.2d 1509, 1513-15 (11th Cir. 1989).

Indeed, in *Lewis v. Jeffers*, — U.S. —, 110 S.Ct. 3092 (1990), this Court applied *Cartwright* in habeas corpus to a case final before *Cartwright* was decided. Jeffers relied on *Cartwright* and *Godfrey* to argue that Arizona's "especially heinous, cruel, or depraved" aggravating circumstances was unconstitutionally vague as applied to him. Arizona's aggravating circumstance more nearly resembled Oklahoma's "especially heinous, atrocious and cruel" aggravating circumstance than it did Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance. This Court applied *Cartwright* while rejecting Jeffers's claim. *Jeffers*, — U.S. at —, 110 S.Ct. at 3100 ("Respondent's reliance on *Godfrey* and *Cartwright* does not yield the result he seeks"). The State of Arizona specifically raised the retroactivity of *Cartwright* in *Lewis v. Jeffers* (Tran-

script of Oral Argument at 16). Given the *Teague* requirement that retroactivity *must* be considered as a threshold question, even if not raised by the parties, the Court's refusal to address retroactivity in response to the State's invitation demonstrates that the rule of *Cartwright* is not new for retroactivity purposes.⁵

Nor is this surprising, for there is an exact parallel between the way in which *Jurek v. Texas*, 428 U.S. 262 (1976), controlled the holding in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and the way in which the *Gregg/Proffitt/Godfrey* line of cases controlled the holding in *Cartwright*. In *Jurek*, the Court upheld the Texas capital sentencing statute on its face upon the expressly stated predicate that the statute could be determined in a certain way not demanded by its language but consistent with its then-extant treatment by the state courts. When the state courts in *Penry* disregarded *Jurek's* predicate, this Court reaffirmed it as a holding, recognizing that to do so involved no announcement of a new rule but simply due respect for "the assurance[s] upon which *Jurek* was based." *Penry*, 492 U.S. at 315. Similarly, *Gregg* and *Proffitt* upheld statutory variations of the "heinous, atrocious or cruel" aggravating circumstance on their face upon the expressly stated predicate that such statutes could be limited by a narrowing interpretation that would meet the "channeling" requirement of *Furman*. The only difference between the two situations is that after *Gregg* and *Proffitt* but before *Cartwright*, *Godfrey* had already converted *Gregg's* and *Proffitt's* predicate into a square constitutional holding. *Godfrey* makes the present case manifestly easier than *Penry* as an instance of a holding dictated by any fair reading of precedent, for it is plain that from *Gregg* and *Proffitt* through *Godfrey* and *Cartwright* to *Jeffers*, *Clemons* and *Shell v. Mississippi*, — U.S. —, 111 S.Ct. 313 (1990) (per curiam), the Eighth

⁵ This Court neither announces nor applies new rules in a post-conviction context. See the retroactivity discussion in Section IIA below.

Amendment rule has been explicit and unchanged: "heinous, atrocious or cruel" language can pass constitutional muster if—but only if—it is subjected to some properly delimiting interpretation.⁶

II. THE REQUIREMENT THAT AN APPELLATE COURT MUST REVIEW THE FACTS AND CIRCUMSTANCES OF THE INDIVIDUAL CASE TO CURE CONSTITUTIONAL ERROR IN A CAPITAL SENTENCING PROCEEDING IS NOT A NEW RULE UNDER *TEAGUE v. LANE*

A. *Teague v. Lane* Requires This Court Apply to James Stringer the Eighth Amendment Rule Applied in *Clemons v. Mississippi* Because That Rule Has Been Applied Retroactively by This Court in *Parker v. Dugger*

Earlier this year, this Court granted Robert Parker relief in habeas corpus. Parker's conviction and death sentence became final in 1985, the same year as did James Stringer's. He was granted habeas relief because the Florida Supreme Court's affirmance of the death sentence "was invalid because it deprived Parker of the individualized treatment to which he is entitled under the Constitution. See *Clemons v. Mississippi*, . . . 494 U.S. [], at —, 110 S.Ct. [1441], at —." *Parker v. Dugger*, 498 U.S. —, —, 111 S.Ct. 731, 740 (1991). In so holding, the Court directly and unequivocally ap-

⁶ See also *Walton v. Arizona*, — U.S. —, —, 110 S.Ct. 3047, 3057 (1990): "[I]n both *Maynard* and *Godfrey* the defendant was sentenced by a jury and the jury either was instructed only in the bare terms of the relevant statute or in terms nearly as vague Neither jury was given a constitutional limiting definition of the challenged aggravating factor. . . . It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in *Maynard* and *Godfrey*. . . . In this case there is no serious argument that Arizona's 'especially heinous, cruel or deprived' aggravating factor is not facially vague. But the Arizona Supreme Court has sought to give substance to the operative terms, and we find its construction meets constitutional requirements."

plied *Clemons v. Mississippi*, 494 U.S. —, 110 S. Ct. 1441 (1990), thus giving *Clemons* retroactive application to a habeas petitioner. The United States Court of Appeals for the Fifth Circuit treated James Stringer differently from how this Court treated Parker by refusing to apply *Clemons*.⁷ This Court's application of *Clemons* in *Parker* resolves the question of the retroactivity of *Clemons* to cases pending in post-conviction proceedings. Moreover, the interest in even-handed justice that underlies *Teague* requires that James Stringer be afforded the benefit of the rule applied to a similarly situated defendant.

This Court neither announces nor applies "new" rules in post-conviction proceedings and accordingly considers retroactivity as a threshold question in every habeas case. "[H]abeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be retroactively applied to *all* defendants on collateral review through one of the two exceptions we have articulated." *Teague v. Lane*, 489 U.S. 288, 316 (1989).

The Court reiterated this principle in the post-conviction case of *Saffle v. Parks*, — U.S. —, —, 110 S.Ct. 1257, 1259-60 (1990): "we must first determine whether the relief sought would create a new rule under *Teague* and *Penry*. . . [i]f so, we will neither announce nor apply the new rule sought by Parks unless it would fall into one of two narrow exceptions." (citations omitted). See also *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) ("we must determine, as a threshold matter, whether granting [Penry] the relief he seeks would cre-

⁷ The lower court's decision in this case was made without benefit of this Court's decision in *Parker*. Since then, the Fifth Circuit has modified a prior opinion by withdrawing its reliance on the non-retroactivity of *Clemons v. Mississippi*, 110 S.Ct. 1441 (1990). *Hill v. Black*, 932 F.2d 369 (5th Cir. 1991) (assuming, without deciding, that *Clemons* is retroactive, thereby modifying prior opinion at 920 F.2d 249 (5th Cir. 1990)).

ate a 'new rule' [because] [u]nder *Teague*, new rules will not be applied or announced in cases on collateral review"); *Butler v. McKellar*, — U.S. —, —, 110 S.Ct. 1212, 1214 (1990) ("a new decision generally is not applicable in cases on collateral review unless the decision was dictated by precedent existing at the time the petitioner's conviction became final"); *Sawyer v. Smith*, — U.S. —, 110 S.Ct. 2822 (1990) (addressing only threshold question whether *Caldwell v. Mississippi*, 472 U.S. 320 (1985), announced new constitutional rule).⁸

As this Court has made clear, the need for evenhanded application of rules of law to all similarly situated defendants dictates this "threshold consideration" requirement.⁹ The principle that litigants in similar situations should be treated the same is "a fundamental component of *stare decisis* and the rule of law generally." *James B. Beam Distilling Co. v. Georgia*, — U.S. —, —, — S.Ct. —, — (1991). The Court observed in *Teague* that "'the integrity of judicial review' requires the application of the new rule to 'all similar cases pending on direct review'" and "because 'selective application

⁸ Even in *Collins v. Youngblood*, — U.S. —, —, 110 S.Ct. 2715, 2718 (1990), the Court faced the issue of retroactivity as a threshold matter. The Court resolved the issue by accepting the State's express waiver of the defense of retroactivity during oral argument.

⁹ Justice Harlan provided a steady and clear voice in support of the proposition that retroactivity must incorporate the principle that similarly situated litigants be treated alike. He reasoned: "Simply fishing one case from the stream of appellate review . . . then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute[s] an indefensible departure from [the constitutional model] of judicial review." *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring and dissenting). See also *Desist v. United States*, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting).

In *Teague*, the Court firmly adopted Justice Harlan's position. 489 U.S. at 310; see also *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989).

of new rules violates the principle of treating similarly situated defendants the same,' we refused to continue to tolerate the inequity that resulted from not applying new rules retroactively to defendants whose cases had not yet become final." *Teague*, 489 U.S. at 304, (quoting *Griffith v. Kentucky*, 479 U.S. 314, 323-24 (1987)).¹⁰

Likewise, the Court will not tolerate disparity in the treatment of similarly situated defendants on collateral review:

Were we to recognize the new rule urged by petitioner in this case, we would have to give petitioner the benefit of that new rule even though it would not be applied retroactively to others similarly situated . . . the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment "hardly comports with the ideal of 'administration of justice with an even hand.'"

Teague, 489 U.S. at 315 (emphasis added) (quoting *Hankerson v. North Carolina*, 432 U.S. 233, 247 (1977) (Powell, J., concurring)).

This Court is obviously aware of its duty to treat retroactivity as a threshold issue, having recognized the obligation in at least five cases in the last two terms and having said that it is indispensable to evenhanded treatment of habeas petitioners.¹¹ The Court must therefore be pre-

¹⁰ Justice O'Connor, writing for a plurality in *American Trucking Associations Inc. v. Smith*, — U.S. —, 110 S.Ct. 2323 (1990), noted: "*Griffith* relied on what, in essence, was a single justification: that it was unfair to apply different rules of criminal procedure to two defendants whose cases were pending on direct review at the same time." *Id.* at —, at 2341.

¹¹ Certainly, the Court below was acutely cognizant of the mandate from this Court to treat retroactivity as a threshold issue. For this reason, in *Smith v. Black*, 904 F.2d 950 (5th Cir. 1990), decided after *Clemons* but before *Parker*, the Fifth Circuit addressed a question to the litigants concerning the retroactivity of this Court's decision in *Clemons*, although the issue had not been raised by

sumed to have acted in accordance with the normal rule applied in federal habeas cases since the announcement of *Teague's* "threshold consideration" requirement in 1989, when, just last Term, it applied *Clemons v. Mississippi* retroactively in the federal habeas context in *Parker v. Dugger*, 498 U.S. —, 111 S.Ct. 731 (1991). Although members of the Court differed over whether the principles of *Clemons* and its predecessors required a judgment for Parker, all nine Justices applied *Clemons* on the merits and none raised the possibility that *Clemons* should not apply retroactively.¹² *Parker* thus makes clear that *Clemons* did not state a new rule and is fully applicable on federal habeas.

In *Parker*, the Florida Supreme Court found two of six aggravating circumstances relied on by the sentencing judge to be invalid under state law. *Parker v. State*, 458 So.2d 750, 754 (1984). The state court nevertheless affirmed the death penalty, noting only that "[t]he trial court found no mitigating circumstances to balance against the aggravating circumstances." *Id.* This Court found this conclusion by the Florida Supreme Court "not fairly supported by the record in this case." *Parker v. Dugger*, 498 U.S. at —, 111 S.Ct. at 739.

either party. Counsel for the State of Mississippi had not raised the issue of retroactivity of *Clemons* in any proceeding before then and had declined to raise the issue in its supplemental brief in James Stringer's case in this Court following the *Clemons* decision. State's Supplemental Brief in Opposition to Certiorari, *Stringer v. Black*, No. 88-7000 at page 8.

¹² The lower courts, with the exception of the Fifth Circuit, have responded similarly by assuming without discussion the retroactivity of *Clemons*. See e.g., *Creech v. Arave*, 928 F.2d 1481, 1493 (9th Cir. 1991) (applying *Clemons* to require granting of writ); *Booker v. Dugger*, 922 F.2d 633, 636-46 (11th Cir. 1991) (Tjoflat, C.J., concurring) (applying *Clemons* to treatment of *Hitchcock* error); *Richmond v. Lewis*, 921 F.2d 933, 947 (9th Cir. 1990) (analyzing *Clemons* and determining it does not apply to Arizona); *Carbray v. Champion*, 905 F.2d 314, 318 (10th Cir. 1990) (*Clemons* applied to state appellate court's reduction of sentence within statutory limit in non-capital case).

The Florida Supreme Court chose not to independently reweigh aggravating and mitigating circumstances. That court affirmed Parker's death sentence "neither based on a review of the individual record in this case nor in reliance on the trial judge's findings based on that record." *Id.* at —, at 740. Although the Florida Supreme Court's review could have been construed as a harmless error test, the Court's failure to independently consider mitigating circumstances found by the trial judge was fatal to Parker's sentence of death. The Florida Supreme Court's review as applied to Parker resembled in most respects a rule of "automatic affirmance".

The *Parker* majority drew the following rule from *Clemons* and the pre-*Clemons* precedents (*Lockett*, *Eddings*, *Barclay* and *Goode*, discussed *infra*):

Following *Clemons*, a reviewing court is not compelled to remand [after striking one or more invalid aggravating circumstances]. It may instead reweigh the evidence or conduct a harmless error analysis based on what the sentencer found. What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings.

Id. at —, at 739.¹³

The dissent in *Parker* also applied the Eighth Amendment rule of *Clemons* and its forebears, but came to a different result. The dissent agreed that if the Florida Supreme Court's interpretation of the trial court's miti-

¹³ The *Parker* majority also relied on a rule that was not central to the Court's decision in *Clemons*. The improper aggravating circumstances considered by the trial judge violated state law but not the federal constitution. The Court's decision in *Parker* was justified in part because of the "crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." 498 U.S. at —, 111 S.Ct. at 739.

gating findings was not "plausible," then that court's action in affirming Parker's death sentence would present a problem under *Barclay v. Florida*, 463 U.S. 939 (1983), and *Clemons v. Mississippi*. *Parker v. Dugger*, 498 U.S. at —, 111 S.Ct. at 746, n.7 (White, J., dissenting). However, the dissenting justices found "nothing implausible about the interpretation the Florida Supreme Court gave to the trial court's findings." *Id.* at —, at 743.¹⁴

James Stringer and Robert Parker are, without doubt, similarly situated from the standpoint of every feature that either the majority or the dissent in *Parker* saw as calling for the application of *Clemons* to Parker's case.¹⁵ The Court below found that the Mississippi Supreme Court employs a rule of automatic affirmance, just as this Court found that "there is a sense in which the [Florida Supreme] Court did not review Parker's sentence at all." *Parker*, 498 U.S. at —, 111 S.Ct. 739. In both cases,

¹⁴ Furthermore, the dissent rejected an Eighth Amendment right to "meaningful appellate review" to be applied by federal courts regardless of constitutional error at trial. *Parker*, 498 U.S. at —, 111 S.Ct. at 742-43 (White, J., dissenting).

¹⁵ The differences in their cases favor Stringer. First, the appellate review which deprived Parker of individualized treatment was occasioned by the sentencing judge's reliance on aggravating circumstances suspect only as a matter of state law. Here, the appellate review which deprives Stringer of individualized treatment is occasioned by the sentencing jury's reliance on a constitutionally invalid aggravating circumstance. Thus, unlike in *Parker*, it is not "difficult to see how any 'error' here could have been of federal constitutional dimension." *Parker*, 498 U.S. at —, 111 S.Ct. at 743 (White, J., dissenting). Second, Parker's appellate review ran afoul of the individualization requirement because the state court erred in its effort to determine the various individualized factors that were found and weighed by the sentencer. The Mississippi Supreme Court, by contrast, did not even attempt to determine the various individualized factors brought into the balance by the jury. Mississippi's automatic affirmance rule intentionally disregards the facts of the case; in *Parker*, the state court could at least plead negligence as to the facts.

then, appellate review by the state court operates to deprive the defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." *Clemons*, 494 U.S. at —, 110 S.Ct. at 1450. Accord *Parker*, 498 U.S. at —, 111 S.Ct. at 740.

Therefore, because this Court has applied *Clemons v. Mississippi* retroactively, and because similarly situated defendants must be treated alike, the Court's decision in *Parker* controls this case.¹⁶ Moreover, as demonstrated below, the Court's retroactive application of *Clemons v. Mississippi* in *Parker* was plainly justified.

B. *Clemons v. Mississippi* Announced No New Rule

The "rule" which the State of Mississippi now claims is "new" was the application of established Eighth Amendment principles stated in *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), *Barclay v. Florida*, 463 U.S. 939 (1983), and *Wainwright v. Goode*, 464 U.S. 78 (1983) (per curiam), to a state appellate court which exercises the power to cure constitutional error by reweighing aggravating and mitigating circumstances.¹⁷ According to this Court, the Mississippi

¹⁶ Even were this Court inclined to decide the *Clemons* retroactivity issue differently as a matter of first impression, it is bound by its previous decision to apply *Clemons* to the habeas petitioner in *Parker*. This Court's affirmative decision to apply *Clemons* retroactively is "water over the dam, irretrievably . . ." *James Beam Distilling Co. v. Georgia*, — U.S. — (1991) (White, J. concurring). See also *id.*, slip op. at 13 (Souter, J., announcing the judgment) ("when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or *res judicata*").

¹⁷ If there was a new rule announced in *Clemons*, it was one beneficial to the State, and succinctly summarized by this Court in *Parker v. Dugger*, 498 U.S. —, —, 111 S.Ct. 731, 739 (1991): "Following *Clemons*, a reviewing court [in a so-called 'weighing' jurisdiction] is not compelled to remand. It may instead reweigh the evidence or conduct a harmless error analysis based on what the

Supreme Court "asserted its authority under Mississippi law to decide for itself whether the death sentence was to be affirmed even though one of the two aggravating circumstances on which the jury had relied should not have been or was improperly presented to the jury." *Clemons*, 494 U.S. at —, 110 S.Ct. at 1447.¹⁸ This interpretation of the role of the appellate court under Mississippi law was "considered by the [Mississippi Supreme Court] to be distinct from its asserted authority to affirm the sentence on the ground of harmless error." *Id.* at 1447.¹⁹

sentencer actually found." See also *Booker v. Dugger*, 922 F.2d 633, 642 (11th Cir. 1991) (Tjoflat, C.J., concurring) (*Clemons* stands for the proposition that state courts in weighing states may act as sentencers). Because no "new obligation" was imposed on the states by this rule, which arguably involved an expansion of the state appellate court's powers, the retroactivity principles of *Teague* are not implicated.

¹⁸ The Mississippi Supreme Court stated in *Clemons v. State*, 535 So.2d 1354 (Miss. 1988), that "this Court has held and established unequivocally through the years that when one aggravating circumstance is found to be invalid or unsupported by the evidence, a remaining valid aggravating circumstance will nonetheless support the death verdict." *Id.* at 1362.

¹⁹ *Clemons* suggests two ways an appellate court may seek to "cure" constitutional error occurring in the sentencing phase of a capital case. The State appellate court may either independently determine the sentence by reweighing valid aggravating and mitigating circumstances, or find that the error which occurred during the sentencing proceeding was harmless beyond a reasonable doubt. *Clemons v. Mississippi*, 494 U.S. —, —, 110 S.Ct. 1441, 1448-51 (1990). In *James Stringer's* case, as in *Clemons*, a conclusion of harmless error would be "difficult to accept". *Id.* at —, at 1451. The State repeatedly emphasized the "especially heinous" factor during the sentencing hearing to the extent of showing color slides of the corpse of the victim to the jury during closing argument and asking jurors, "Is that atrocious? Is that cruel?" (T-1370-71, 1373-74, 1377-78). Also, as in *Clemons*, the State placed little emphasis on the other aggravating circumstances. Moreover, the mitigating evidence tells a compelling story of a fifty-year-old veteran who contributed much to society and who suffered greatly prior to his involvement in this crime.

Clemons argued that "appellate courts are unable to fully consider and give effect to mitigating evidence presented by defendants at the sentencing phase in a capital case and that it therefore violates the Eighth Amendment for an appellate court to undertake to reweigh aggravating and mitigating circumstances in an attempt to salvage the death sentence imposed by a jury." *Id.* at —, at 1448. The Court acknowledged that the "primary concern in the Eighth Amendment context has been that the sentencing decision be based on facts and circumstances of the defendant, his background, and his crime." *Id.* at —, at 1448 (citations omitted). But the Court found that "nothing inherent in the process of appellate reweighing" is inconsistent with the pursuit of the "twin objectives" of 'measured consistent application and fairness to the accused.' " *Id.* (quoting *Eddings*, 455 U.S. at 110-11). The Court concluded that state appellate courts "can and do give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances, his background, and the crime." *Clemons*, 494 U.S. at —, 110 S.Ct. at 1449.

The Court nevertheless found itself unable to uphold *Clemons's* death sentence. Although the Mississippi Supreme Court *might* have salvaged the sentence from the *Cartwright* error committed when *Clemons's* jury was instructed in the unlimited language of Mississippi's "especially heinous, atrocious or cruel" aggravating circumstance, it could do this only by finding the instructional error harmless (beyond a reasonable doubt) or by re-determining *Clemons's* sentence independently on appeal. Either constitutionally valid approach would have required some form of consideration of mitigating circumstances. The Mississippi Supreme Court's opinion reflected neither approach with clarity nor reflected any consideration of mitigating circumstances at all; thus it could not constitutionally support affirmance of *Clemons's* death sentence.

In so holding, *Clemons* merely applied the time-honored rule of *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), that a criminal defendant in a capital proceeding is entitled to individualized consideration of all factors relevant to his background, history, and circumstances of the crime.²⁰ The rule applies regardless of whether the ultimate sentencing decision is being made by a jury, *Lockett v. Ohio*, 438 U.S. at 605, a trial judge, *Spaziano v. Florida*, 468 U.S. 447, 459 (1984), or a state appellate court, *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982); *Barclay v. Florida*, 463 U.S. 939, 958 (1983). The Court in *Clemons* recognized that Mississippi's rule of "automatic affirmance," which by definition involves no "individualized and reliable sentencing determination based on the defendant's circumstances, his background and the crime," violates *Lockett*, *Eddings* and *Barclay*:

[A]lthough [the relevant passage from the Mississippi Supreme Court's opinion] does not necessarily indicate that no reweighing was undertaken, the court's statement can be read as a rule authorizing or requiring affirmance of a death sentence so long as there remains at least one valid aggravating circumstance. If that is what the Mississippi Supreme Court meant, then it was not conducting appellate

²⁰ Both *Lockett* and *Eddings* involved restrictions on capital sentencers' or state appellate courts' consideration of mitigating circumstances, restrictions condemned by the United States Supreme Court in 1976. See, e.g., *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (criticizing "[t]he constitutional vice of . . . lack of focus on . . . the character and propensities of the offender . . ."); *Jurek v. Texas*, 428 U.S. 262, 273-74 (1976) ("as in Georgia and Florida, the Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the . . . individual offender before it can impose a death sentence"); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (invalidating a mandatory death penalty statute which failed to permit consideration of the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death").

reweighing as we understand the concept. An automatic rule of affirmance in a weighing State would be invalid under *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances. Cf. *Barclay v. Florida*, 463 U.S. 939, 958, 103 S.Ct. 3418, 3429, 77 L.Ed.2d 1134 (1983). Additionally, because the Mississippi Supreme Court's opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented by *Clemons* to the jury, we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence. We must, therefore, vacate the judgment below, and remand for further proceedings, insofar as the judgment below purported to rely on the State Supreme Court's reweighing of aggravating and mitigating circumstances. Cf. *Cabana v. Bullock*, 474 U.S. at 390-392, 106 S.Ct. at 699-700 (1986).

Clemons, 494 U.S. at —, 110 S.Ct. at 1450.

As the Court emphasizes in *Clemons*, there is nothing new about the requirement of individualized sentencing in capital cases, which has been the "primary concern in the Eighth Amendment context". *Id.* at —, at 1448. The rule well predates the time when James Stringer's case was final in 1985. "Th[e United States Supreme] Court's decisions in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), were rendered before his conviction became final. Under the retroactivity principles adopted in *Griffith v. Kentucky*, 479 U.S. 314 (1987), Petitioner is entitled to the benefit of those decisions." *Penry v. Lynaugh*, 492 U.S. 302, 314-15 (1989).

In *Lockett*, the Court considered a statute which permitted sentencer consideration of some mitigating aspects

of a defendant's background, but not others. The Court responded with an emphasis on individualized sentencing in capital cases:

Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence . . . [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Lockett, 438 U.S. at 605.

There also is nothing new about the requirement that appellate courts necessarily must examine the facts and circumstances of the individual case to cure constitutional error occurring at a capital sentencing hearing. The rule was applied in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), to a claim by the State of Oklahoma that review by a state appellate court cured constitutional error which occurred at the sentencing phase of trial. In *Eddings*, the trial judge ruled that in "following the law" he could not consider the mitigating effect of Edding's tumultuous family history. *Id.* at 112-13. The Court of Criminal Appeals also failed to consider evidence of family history, finding that this "evidence in mitigation was not relevant because it did not tend to provide a legal excuse from criminal responsibility." *Id.* at 113. This Court held that "[t]he sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from consideration." *Id.* at 114-15 (emphasis added). The Court concluded

that "the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them." *Id.* at 117. This holding by the court in *Eddings* dictates the rule applied in *Clemons* and *Parker* forbidding "automatic affirmance" despite error at trial.

The dissenting justices in *Eddings* agreed that it was necessary for the Court of Criminal Appeals to consider the mitigating evidence to cure the purported error by the trial judge, but disagreed whether such consideration took place.²¹ Chief Justice Burger rejected the plurality's conclusion that mitigating evidence had not been considered by the state appellate court:

The Oklahoma Court of Criminal Appeals independently examined the evidence of "aggravating and mitigating" factors presented at Eddings' sentencing hearing. 616 P.2d 1159 (1980). . . . The Court of Criminal Appeals most assuredly did *not*, as the Court's opinion suggests, hold that this "evidence in mitigation was not relevant," see *ibid.*; indeed, had the Court of Criminal Appeals thought the evidence irrelevant, it is unlikely that it would have spent several paragraphs summarizing it. The Court's opinion offers no reasonable explanation for its assumption that the Court of Criminal Appeals considered itself bound by some unstated legal principle not to "consider" Eddings background.

Eddings, 455 U.S. at 125-26 (Burger, C.J., dissenting). Chief Justice Burger found that "[t]wo Oklahoma courts have weighed the evidence and found it insufficient to offset the aggravating circumstances shown by the State." *Id.* at 127.

²¹ Justice O'Connor stated in a concurring opinion that "we may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, . . . *Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court." *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring).

The lessons of *Eddings* are apparent. Every member of this Court agreed that if a state appellate court is to cure constitutional error occurring at the sentencing phase of trial it must consider and give effect to evidence in mitigation. The appellate court must weigh all relevant and valid mitigating and aggravating factors, or perform an individualized review of the error in which mitigating evidence is taken into account. An appellate court which considers itself bound by legal principle not to consider evidence in mitigation fails to cure trial court error.

It was thus black letter Eighth Amendment law at the time of Petitioner's trial and appeal that an appellate court which attempts to cure constitutional error in the sentencer's weighing decision must independently consider all evidence on the "mitigation" side of the scale, or, alternatively, perform a harmless error review which similarly heeds mitigating circumstances in the case. As in *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989), the Court's "reasoning in *Lockett* and *Eddings* . . . compels a remand for resentencing." See also *Saffle v. Parks*, — U.S. at —, 110 S.Ct. at 1262 (*Penry* "did not require the creation of a new rule" because it simply applied in a different context the "*Lockett* and *Eddings* command that the State must allow the jury to give effect to mitigating evidence in making the sentencing determination"). Thus, *Clemons v. Mississippi* did not "announce a new rule but was 'merely an application of the principle that governed [the] decision[s]'" in *Lockett* and *Eddings*. *Penry*, 492 U.S. at 314, (quoting *Yates v. Aiken*, 484 U.S. 211, 216-217 (1988)).

Long before *Eddings*, this Court required state appellate review of vague aggravating circumstances that may have affected the sentencing determination. In *Proffitt v. Florida*, 428 U.S. 242 (1976), a plurality of this Court put states on notice that individualized appellate review would be required to "assure that the death penalty will not be imposed in an arbitrary or capricious manner."

428 U.S. at 253 (plurality opinion of Stewart, Powell, and Stevens, JJ.). The risk of arbitrary and capricious imposition of the death penalty was "minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida to determine independently whether the imposition of the ultimate penalty is warranted." *Id.*

In *Proffitt*, the Court considered a claim that one of many aggravating factors found by the trial judge, that "[t]he defendant knowingly created a great risk of death to many persons," was vague and overbroad on its face. The Court noted that this provision was not impermissibly vague as construed by the Supreme Court of Florida in previous cases. The Court then rejected the contention that the application under the facts of *Proffitt's* case necessarily broadened the construction of the aggravating circumstance in an unconstitutional manner. According to the Court:

While it may be argued that this case broadens that construction, since only one person other than the victim was attacked at all and then only by being hit with a fist, this would be to read more into the State Supreme Court's opinion than is actually there. That court considered 11 claims of error advanced by the petitioner, including the trial judge's finding that none of the statutory mitigating circumstances existed. It did not, however, consider whether the findings as to each of the statutory aggravating circumstances were supported by the evidence. If only one aggravating circumstance had been found, or if some mitigating circumstance had been found to exist but not to outweigh the aggravating circumstances, we would be justified in concluding that the State Supreme Court had necessarily decided this point even though it had not expressly done so. However, in the circumstances of this case, when four separate aggravating circumstances were found and where each mitigating circumstance was expressly found

not to exist, no such holding on the part of the State Supreme Court can be implied.

Id. at 256 n.13. (emphasis added). The Court allowed the Supreme Court of Florida to ignore arguably overbroad aggravating circumstances considered by the sentencer, *but only where those circumstances could not possibly have affected the outcome of the sentencing determination because a finding of no mitigation had been made and properly reviewed on appeal.*

Later cases have consistently adhered to *Eddings's* requirement that a state appellate court must give individualized consideration to the particular sentencing record under review if it undertakes to affirm a death sentence despite trial court error relating to aggravating circumstances. The cases have arisen in a variety of settings, some involving constitutional error and some involving only state-law error in the trial court. Every case, however, has insisted that a state court's decision to affirm must reflect some individualized consideration of the effect of the error in the light of the relevant facts of record bearing upon sentence. "What is important," the Court has reiterated, "is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (emphasis in original); *Barclay v. Florida*, 463 U.S. 939, 958 (1983).

In *Barclay*, the Court considered an aggravating circumstance, invalid under Florida law, in the context of a statute which operates similarly to the Mississippi statute in that it calls for the "weighing" of particular aggravating circumstances against the mitigating circumstances. 463 U.S. at 954; *Clemons*, 494 U.S. at —, 110 S.Ct. at 1446 (Florida and Mississippi statutes, unlike Georgia scheme examined in *Zant*, require jury to weigh specific aggravating circumstances that it has found against mitigating circumstances to determine whether death sentence is appropriate). The Court noted "the question whether [the defendant's] sentence must be va-

cated depends on the function of the finding of aggravating circumstances under Florida law and on the reason why this aggravating circumstance is invalid." *Barclay*, 463 U.S. at 951; *see also Zant*, 462 U.S. at 864.

The issue in *Barclay* thus was defined as whether the "trial judge's consideration of [an aggravating circumstance invalid under the state law but valid under the federal Constitution] so infects the balancing process created by the Florida statute that it is constitutionally impermissible for the Florida Supreme Court to let the sentence stand." 463 U.S. at 956.²² The Court held, consistent with *Eddings v. Oklahoma*, that:

There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance. See n.9, *supra*. "What is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant, supra*, at 879 (emphasis in original).

Barclay, 463 U.S. at 958.

The approach taken by this Court in *Barclay*, even as it is applied to improper aggravating circumstances under *State law*, is incompatible with a procedure of "automatic affirmance." No appellate court could determine whether the "improper aggravating circumstance so infects the balancing process created by the Florida statute that it is constitutionally impermissible to let the sentence stand" without some determination of the quality of the factors being balanced. *Cf. Clemons*, 494 U.S. at —, 110 S.Ct. at 1448 ("It is a routine task of appellate courts to decide whether the evidence supports a

²² Because the Court found no constitutional error in the aggravating circumstances considered by the sentencer, the Court saw no need to apply the type of the "federal harmless-error analysis" which was necessary in *Zant*. *Barclay*, 463 U.S. at 951, n.8.

jury verdict and in capital cases in 'weighing' States, to consider whether the evidence is such that the sentencer could have arrived at the death sentence that was imposed"). Mindful of that fact, the *Barclay* Court required "an individualized determination on the basis of the character of the individual and the circumstances of the crime," and in this regard found that "the Florida Supreme Court does not apply its harmless-error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless." *Barclay*, 463 U.S. at 958, (citing *Zant* at 879 (emphasis in original)).

In *Wainwright v. Goode*, 464 U.S. 78 (1983) (per curiam), the Court endorsed an alternative "cure" by a state appellate court for sentencing phase error. The trial judge's findings of two mitigating circumstances prevented the state appellate court from concluding that the sentencer's reliance on an improper aggravating circumstance was harmless as in *Barclay*. *Id.* at 80. The sentence could stand, however, because the state appellate court "independent[ly] reweigh[ed] . . . the aggravating and mitigating circumstances" without including the invalid aggravating circumstance in the balance. *Id.* at 86-87.

Thus, *Barclay* and *Goode* left no room for an appellate court in a "weighing" state like Mississippi to "automatically affirm" a death sentence imposed in reliance upon an unconstitutional aggravating circumstance. A rule of "automatic affirmance" is the antithesis of an "individualized determination" that "the elimination of the improperly considered aggravating circumstances could not possibly affect the balance," *Barclay*, 463 U.S. at 958, or an "independent reweighing of the aggravating and mitigating circumstances." *Goode*, 464 U.S. at 87.

The inescapable conclusion from analysis of *Lockett*, *Eddings*, *Barclay* and *Goode* is that the Eighth Amend-

ment principle upon which James Stringer relies—i.e., the necessity of individualized review by state appellate courts to cure constitutional error in the sentencing phase of capital cases—was the established law long before Stringer's conviction was final in 1985. *Clemons* states that a state appellate court may reweigh aggravating and mitigating circumstances to cure constitutional error at the trial court level. But the opinion in no way alters the established law that such a cure must be employed in an individualized fashion.

Because aggravating circumstances played no role in "determining" punishment under the Georgia sentencing scheme, *Zant v. Stephens*, did not influence the Court's decision in *Clemons*. See *Clemons*, 494 U.S. at —, 110 S.Ct. at 1446. In *Zant*, decided before *Barclay* and *Goode*, the Court sought to determine whether the presence of an unconstitutionally vague statutory aggravating circumstance "may have affected the jury's deliberations."²³ *Zant*, 462 U.S. at 885. Because "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty" in Georgia, the "mere fact that some of the aggravating circumstances presented were improperly designated 'statutory' had 'an inconsequential impact on the jury's decision regarding the death penalty.'" *Id.* at 874, 889; see also, *id.* at 894 (Rehnquist, J., concurring in the judgment). Thus the dispositive fact in *Zant* was that "in Georgia, unlike some states, the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance

²³ The Court first determined that the limited role of aggravating circumstances in Georgia's statutory scheme was constitutionally valid, and that an unconstitutional aggravating circumstance would not necessarily require vacating the death sentence pursuant to *Stromberg v. California*, 283 U.S. 359 (1931).

aggravating circumstances against mitigating circumstances pursuant to any special standard." *Id.* at 873-74.²⁴ The Court explicitly held that its decision in *Zant* had no application to a state sentencing scheme where the sentencer was required to weigh aggravating and mitigating circumstances. *Id.* at 873-74, n.12, 890.

The *Zant* opinion reemphasized the constitutional requirement of "individualized determination and appellate review at the selection stage" and noted that the decision "depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness" *Id.* at 879, 890. Nothing in the opinion gave state appellate courts permission to affirm, without individualized review, a death sentence imposed by a sentencer that relied on an unconstitutional aggravating factor. On the contrary, state appellate courts were charged with determining, as this Court itself did in *Zant*, whether the invalid aggravating circumstance "may have affected the jury's deliberations." *Id.* at 885. That determination requires "careful scrutiny" because of the "severity of the sentence." *Id.* As such, *Zant* could not possibly be said to countenance a rule of "automatic affirmance" in a weighing jurisdiction. "Automatic affirmance" involves no scrutiny whatsoever; by definition, it ignores the actual effect an invalid aggravating circumstance may have had on a jury's ultimate sentencing determination.²⁵ Therefore, to the extent the

²⁴ States with statutes like Georgia's have since the *Zant* decision relied upon the limited role aggravating circumstances play in their statutory schemes to justify affirming death sentences despite the presence of an invalid or unconstitutional aggravating circumstance. See, e.g., *State v. Plath*, 313 S.E.2d 619, 629 (S.C. 1984); *Flamer v. State*, 490 A.2d 104, 135-136 (Del. 1983); *People v. Coleman*, 129 Ill.2d 321, 135 Ill.Dec. 834, 544 N.E.2d 330, 341 (1983); *State v. LaRette*, 648 S.W.2d 96, 102 (Mo. 1983).

²⁵ Even in a non-weighing jurisdiction, like Georgia, some case-specific individualized scrutiny is required where an invalid aggravating circumstance has been employed. In *Zant*, this Court ac-

Fifth Circuit and the Mississippi Supreme Court relied on *Zant* as a justification for a rule of "automatic affirmance,"²⁶ they did so in spite of and not because of the language of the Court's decision in *Zant*.

C. At the Time Petitioner's Conviction Was Final, State Courts in "Weighing" Jurisdictions Understood the Constitutional Requirement to Consider the Effect of an Unconstitutional Aggravating Circumstance on the Sentencer's Death Verdict

Given the strength and breadth of the precedent requiring individualized review of trial court error by a state supreme court in a "weighing" jurisdiction, the State of Mississippi declined to argue in *Clemons v. Mississippi* that a rule of "automatic affirmance," applied by the Mississippi Supreme Court in *Clemons* was sufficient to salvage the death sentence. Instead, Mississippi relied on *Zant*, *Barclay*, *Goode*, and *Satterwhite v. Texas*, 486 U.S. 249 (1988), to support its argument that a harmless error or reweighing analysis does not offend the Constitution. Mississippi's Attorney General argued that a majority of the states addressing the issue allow "a reweighing or harmless error analysis to be conducted in such situations," in lieu of automatic reversal. When asked during oral argument whether a procedure of "automatic affirmance" would cure constitutional error if applied in Mississippi, the Attorney for Mississippi agreed it would not.²⁷

cepted the Georgia Supreme Court's "view that the subsequent invalidation of one of several aggravating circumstances does not automatically require reversal of the death penalty, *having been assured that a death sentence will be set aside if the invalidation of an aggravating circumstance makes the penalty arbitrary or capricious.*" *Zant v. Stephens*, 462 U.S. at 890 (emphasis added).

²⁶ See, e.g., *Stringer v. Jackson*, 862 F.2d 1108, 1113-15 (5th Cir. 1988); *Irving v. State*, 498 So.2d 305, 314 (Miss. 1986).

²⁷ QUESTION: "And, if the Mississippi court does not meet the *Chapman* standard, or if we disagree with the harmless error analysis, then the case has to be reversed, correct?"

[Continued]

Under *Teague* and *Penry*, one important indicator is what view a state court would have taken of a claim based on this kind of rule at the time James Stringer's conviction became final on February 19, 1985. See *Penry*, 492 U.S. at 313; *Teague*, 489 U.S. at 301. *Teague* prescribes non-retroactivity for constitutional rules that "break new ground or impose a new obligation on the States or the Federal Government" or that announce a result that "was not dictated by precedent." *Penry*, 492 U.S. at 314 (quoting *Teague*, 489 U.S. at 301, with emphasis in original). Conversely, retroactive application of Eighth Amendment rights is appropriate when it would serve "as a necessary incentive for trial and appellate judges throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." *Teague*, 489 U.S. at 306 (quoting *Desist v. U.S.*, 394 U.S. 244, 262-263 (1969) (Harlan, J., dissenting)). As *Penry* reveals, the retroactivity inquiry should

²⁷ [Continued]

MR. WHITE: "Unless—unless there is the reweighing. I mean, that—"

QUESTION: "Well, you just conceded that a plausible way to read the opinion is to say there is no reweighing, that it is just harmless error. And I say if you are wrong on harmless error, then it has to be reversed. Right?"

MR. WHITE: "Well, I would have to agree with you there, I guess, in that situation. . . ."

QUESTION: "Mississippi's—under the statute, Mississippi is a weighing state. You weigh aggravating against mitigating."

MR. WHITE: "That is right."

QUESTION: "And unless somebody does the weighing, they aren't following the statute. And if the Mississippi court is saying this is just a rule of law, we don't have—if we invalidate two of three aggravating circumstances, but nevertheless affirm, without going through a weighing process or even saying the aggravating circumstances nevertheless outweighs the mitigating, they are then seemingly disregarding their own statute that is still the law in Mississippi."

MR. WHITE: "That would be correct there. . . ."

Clemons v. Mississippi, Case No. 88-6873, Official Transcript Proceedings Before the Supreme Court of the United States pp. 25, 29.

be focused on the expectations generated by previously established decisions concerning the actions to be taken by state courts, who were charged with the duty of applying Eighth Amendment precedent conscientiously to the evolving problems that came before them. See *Penry*, 492 U.S. at 315-319.

Of all the states which purport to limit capital sentencers to a "weighing" of a limited set of specified aggravating factors against mitigating factors to determine sentence, only Mississippi took the view that a death sentence should be affirmed notwithstanding the sentencer's use of an unconstitutionally vague aggravating circumstance merely because another valid aggravating circumstance was found—i.e., without any regard whatsoever for the mitigating circumstances in the case.

Before *Clemons*, most "weighing" states held that the Eighth Amendment forbids such unindividualized treatment in a capital case, pointing to *Furman*, *Proffitt*, *Barclay*, *Goode* and *Zant*. See, e.g., *Baldwin v. State*, 456 So.2d 117, 125-28 (Ala.Crim.App. 1983) (applying harmless error test mandated by *Barclay*); *People v. Brown*, 758 P.2d 1135, 1144-45 (Cal. 1988) (relying on *Woodson v. North Carolina*, *Satterwhite v. Texas*, and *Zant v. Stephens* for the proposition that the constitution requires a stricter harmless error test for constitutional error in capital sentencing determinations than the one that court normally applied to errors of state law); *Elledge v. State*, 346 So.2d 998, 1003 (Fla. 1977) (*Furman* dictates reversal "when we do not know whether the result of the weighing process would have been different had the impermissible aggravating circumstance not been present"); *State v. Henderson*, 789 P.2d 603, 609-11 (N.M. 1990) (*Barclay* requires reversal where the court is unable to determine the impact of an invalid aggravating circumstance on the death sentence because no express findings regarding mitigating circumstances were made at the trial level); *State v. Davis*, 528 N.E.2d 925, 931-36 (Ohio 1988) (applying harmless error test mandated by *Bar-*

clay); *Stouffer v. State*, 742 P.2d 562, 564-65 (Okla. Crim.App. 1987 (same)); *Commonwealth v. Holcomb*, 498 A.2d 833, 864-65 (Pa. 1985) (Larsen, J., dissenting) (urging adoption of the *Barclay* harmless error test in lieu of automatic reversal rule adopted by majority); *State v. Hines*, 758 S.W.2d 515, 524 (Tenn. 1988) (applying *Chapman v. California* harmless error test); *Hopkinson v. State*, 632 P.2d 79, 171-72 (Wyo. 1981) (*Furman* dictates reversal "when we do not know whether the result of the weighing process would have been different had the impermissible aggravating circumstances not been present"); see also, *Lindsey v. Thigpen*, 875 F.2d 1509, 1515 (11th Cir. 1989) (Where the trial court found four aggravating factors and no mitigating factors, consideration of the "especially heinous, atrocious or cruel" aggravating circumstance was harmless under the reasoning of *Barclay*); *Coleman v. Saffle*, 869 F.2d 1377, 1387-90 (10th Cir. 1989) (*Barclay* and *Zant* allow application of an individualized harmless error review; where four valid aggravating circumstances and no mitigating circumstances, error harmless beyond a reasonable doubt).

Other "weighing" states also rejected an automatic affirmation approach before *Clemons*, although without explicit reliance on the Eighth Amendment. See, e.g., *Williams v. State*, 274 Ark. 9, 10, 621 S.W.2d, 686, 687 (1981); *Thompson v. State*, 492 N.E.2d 264 (Ind. 1986); *State v. Peery*, 199 Neb. 656, 657-58, 261 N.W.2d 95, 96 (1977); *State v. Irwin*, 304 N.C. 93, 107, 281 S.E.2d 439, 449 (1981); *State v. Carter*, 776 P.2d 886, 896 (Utah 1989). The remaining "weighing" states never addressed the issue prior to this Court's decision in *Clemons*.

Moreover, states with Georgia-like capital statutes have relied upon the limited function that aggravating circumstances serve under their statutory schemes to uphold sentences of death notwithstanding sentencer consideration of an invalid aggravating circumstance. See, e.g., *Flamer v. State*, 490 A.2d 104, 135-36 (Del. 1983) (Delaware's statute is similar to Georgia's statute as described

in *Zant* and unlike Florida scheme in *Barclay*; trial court's instructions did not place particular emphasis on the role of statutory aggravating circumstances or suggest that the presence of more than one aggravating circumstance should be given special weight); *People v. Coleman*, 129 Ill.2d 321, 343-345, 135 Ill.Dec. 834, 544 N.E.2d 330, 342 (1989) (Like Georgia, Illinois does not place special emphasis on any aggravating factor and does not accord any added significance to multiple aggravating circumstances as opposed to a single such circumstance); *State v. LaRette*, 648 S.W.2d 96, 102 (Mo. 1983) (having found the threshold requirements of statutory aggravating circumstances, the jury could consider all the evidence adduced at trial in imposing the death sentence); *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619, 629 (1984) (additional aggravating circumstances do not contribute to the actual selection of the death penalty because juries are not instructed to "weigh" aggravating against mitigating circumstances); see also, *Briley v. Bass*, 742 F.2d 155, 166 (4th Cir. 1984) (Virginia, like Georgia, does not require the jury to "give any special weight to any particular aggravating circumstances, to consider multiple aggravating circumstances more significant than one aggravating circumstance or to balance aggravating circumstances against mitigating circumstances under a special standard").

The lower courts understood, therefore, that some type of individualized review was required by the constitution to cure errors in instructions on aggravating circumstances, where each aggravating circumstance found to exist by the sentencer played a role in determining punishment. Mississippi appears to have stood alone among "weighing" jurisdictions in applying a rule which permits constitutional error to stand unrectified without regard to the impact of the error upon the actual mix of aggravating and mitigating circumstances in the case.

Mississippi's choice was not the product of a reasoned decision. Originally, prior to *Zant v. Stephens*, the Mis-

Mississippi Supreme Court explicitly adopted the Florida Supreme Court's approach to review erroneous aggravating circumstances. See, e.g., *Gilliard v. State*, 428 So.2d 576, 586 (Miss. 1983) (upholding the death sentence despite presence of arguably unconstitutional aggravating circumstance by relying on Florida Supreme Court's decision in *Dobbert v. Florida*, 375 So.2d 1069 (Fla. 1979); "[t]he only distinction between *Dobbert* and the present case is that in *Dobbert*, under Florida law, the judge determined the sentence without a jury"); *Evans v. State*, 422 So.2d 737, 741-742 (Miss. 1982) (Despite the presence of arguably invalid aggravating circumstances, "there were other aggravating circumstances in the present case, and, under the Florida decisions, they were sufficient to sustain the conviction"). That is, the Court purported to apply an individualized harmless error rule like the Florida approach examined in *Barclay*. See 463 U.S. at 958 (1983) ("the Florida Supreme Court does not apply its harmless-error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless").

The Mississippi Supreme Court gradually shifted, without acknowledging a change, to a rule of "automatic affirmance." In no case has the Mississippi court undertaken to square the change with the rule of individualized treatment acknowledged by this Court's decisions long before *Clemons* in *Eddings*, *Zant*, *Barclay* and *Goode*. Nevertheless, as a result of this unexamined change, deferred to by the United States Court of Appeals for the Fifth Circuit, no court has determined whether the constitutionally invalid aggravating circumstance presented to James Stringer's jury may have contributed to the jury's death verdict. That failure was inconsistent with the settled law of the Eighth Amendment in 1985, as well as five years later, when *Clemons* was decided.

CONCLUSION

For all the foregoing reasons, the judgment below should be reversed and petitioner's case should be remanded with instructions to grant the writ of habeas corpus, permitting the Mississippi courts to conduct resentencing within a reasonable time.

Respectfully submitted,

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RESPONDENT'S BRIEF

(8)

Supreme Court, U.S.
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NO. 90-6616

In The Supreme Court of the United States
October Term, 1991

JAMES R. STRINGER,
PETITIONER

VERSUS

LEE ROY BLACK, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL.
RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Were Clemons v. Mississippi and Maynard v. Cartwright dictated by precedent, such that they cannot be considered "new rules" under Teague v. Lane?

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NO. 90-66616

**IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991**

**JAMES R. STRINGER,
Petitioner**

versus

**LEE ROY BLACK,
Commissioner, et al.
Respondent**

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

BRIEF OF RESPONDENTS

This matter is before the Court on the Petition of James R. Stringer for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit wherein the Court affirmed the denial of habeas corpus relief as to his conviction for capital murder and sentence of death.

OPINION BELOW

The opinion of the Court of Appeals denying habeas review is reported as

Stringer v. Jackson, 909 F.2d 111 (5th Cir. 1990). The opinion is reprinted at JA 68-69.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. §1254(1) challenging the constitutionality of his sentence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has adequately identified the pertinent constitutional provisions involved and set them forth in the Brief of Petitioner.

STATEMENT OF THE CASE

A. Substantive Facts:

The conviction and sentence of death arise out of the June 21, 1982, armed robbery and murder of Ray McWilliams and his wife Nell in their home. Petitioner, his son and several others went to the

McWilliams' home to rob them of a large amount of cash and jewels supposedly kept there in a safe. The brutal facts of this crime are graphically and sufficiently set forth in the opinion of the Mississippi Supreme Court, and we would adopt them as our statement of facts here. Stringer v. State, 454 So.2d 468, 471-473 (Miss. 1984).

B. Procedural History:

Petitioner was indicted for capital murder by the grand jury of the Circuit Court of Hinds County, Mississippi, First Judicial District, during the July 1982 Term of said court. Petitioner's trial was conducted during the September 1982 Term of said court before a properly empaneled jury. After hearing the evidence and being fully instructed as to the law, the jury returned a verdict of guilty of capital murder. The trial then proceeded to the issue of sentence. At

the conclusion of the sentencing phase of the trial the jury returned a sentence of death in proper form, finding that the following aggravating circumstances existed:

We the jury, unanimously find that the aggravating circumstances of:

1. The Defendant contemplated that life would be taken and/or the capital murder was intentionally committed and that the Defendant was engaged in an attempt to commit a robbery; and was committed for pecuniary gain.

2. The capital murder was committed for the purpose of avoiding or preventing the detection and lawful arrest of James R. Stringer, the Defendant.

3. The capital murder was especially heinous, atrocious or cruel.

Tr. 1435.

After trial, but prior to the perfection of the direct appeal in this case, a petition for writ of error coram nobis was filed in the Circuit Court.

After an evidentiary hearing was conducted on this petition, it was denied. An appeal was taken to the Mississippi Supreme Court challenging the conviction of capital murder and the death sentence and the denial of the petition for writ of error coram nobis. On his automatic appeal to the state supreme court petitioner raised the following claims:

On direct appeal:

1. The Court erred in allowing the District Attorney to cross examine the appellant about his unwillingness to submit to a lie detector test, over the objection of counsel and in admitting into evidence an agreement between the district attorney's office and the witnesses, Brock and Medders to have their version of the events corroborated by a lie detector test, this admission into evidence although not objected to at the time is plain error under the rules of this Court.

2. It was highly improper and prejudicial for the Trial Court to permit the state to question the defense witnesses, Tammy Williams, and the defendant, James Stringer, about

what drugs they had used or were using and to allow into evidence against the defendant a weapon concealed in his boot at the time of his arrest which bore no relation to the crime.

3. Appellant was deprived of effective assistance of counsel.

4. The Court erred in allowing the District Attorney to ask and elicit an answer from the defense witness, Tammy Williams, that she had been "charged" with conspiracy to commit murder and accessory after the fact.

5. The appellant respectfully submits that this case should be reversed if for no other reason that on the basis of the entire record, taking all errors and prejudicial matter into consideration, the defendant was deprived of a fair trial.

On error coram nobis appeal:

1. The court erred in allowing the witness Walter Owens, III to invoke the Fifth Amendment.

2. The court erred in not allowing defense counsel to amend his petition to include the destruction of the tape.

Stringer v. State, 454 So.2d at 479, 480.

These two appeals were consolidated and heard together. On July 11, 1984, the Mississippi Supreme Court unanimously affirmed the conviction and sentence of death entered by the Hinds County jury and also affirmed the denial of coram nobis relief. A petition for rehearing was filed, and the original opinion was modified on denial of the petition for rehearing on August 15, 1984. Stringer v. State, 454 So.2d 468 (Miss. 1984). This modification did not disturb the affirmance of the conviction and death sentence.

Stringer then petitioned this Court to grant a petition for writ of certiorari to the Mississippi Supreme Court. This petition stated as its Questions Presented the following claims:

1. Was petitioner denied effective assistance of counsel in violation of the 6th and 14th Amendments?

2. Did cross examination about refusal to take a polygraph test offend the 5th and 14th Amendments?

3. Did refusal to instruct jury during the penalty stage of capital trial that jury could grant mercy even if the aggravating circumstances outweigh mitigating circumstances offend the 8th and 14th Amendments?

4. Were persons who expressed reservations about the death penalty improperly excluded from the jury in violation of the 6th and 14th Amendments?

5. Did the state courts erroneously conclude that the evidenced fully supported the findings of statutory aggravating circumstances in violation of the 8th and 14th Amendments?

Petition for Writ of Certiorari.

The State responded. In due course the petition was denied by this Court on February 19, 1985. Stringer v. Mississippi, 469 U.S. 1230 (1985).

Petitioner then filed a Motion To Vacate Or Set Aside Judgment And Sentence with the Mississippi Supreme Court in

compliance with Miss. Code Ann., §99-39-1, et seq. (Supp. 1990), raising numerous claims. On January 15, 1986, the Mississippi Supreme Court denied post-conviction relief with a written opinion. Stringer v. State, 485 So.2d 274 (Miss. 1986). A petition for rehearing was denied on April 9, 1986.

Petitioner then filed a petition for writ of certiorari from this denial of post-conviction relief claiming:

Was petitioner denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution where his trial attorney refused to present mitigation testimony from family members at the penalty phase of his capital trial because the trial attorney believed such testimony might compromise the defense of petitioner's son, who was also charged with capital murder for the same offense and who was represented by the same trial attorney?

This petition was denied on October 20, 1986 by this Court. Stringer v.

Mississippi, 479 U.S. 922 (1986). The Mississippi Supreme Court then, on motion of the State, reset an execution date for petitioner.

In response, petitioner filed a petition for writ of habeas corpus and a motion for stay of execution with the United States District Court for the Southern District of Mississippi. A stay of execution was entered on January 12, 1987, by the District Court. On November 20, 1987, after conducting an evidentiary hearing, the District Court entered its Memorandum Opinion and Order denying relief on all issues. Stringer v. Scroggy, 675 F.Supp. 356 (S.D. Miss. 1987). A motion to alter or amend under Rule 59(e) was timely filed. This motion was denied with a five page written opinion on January 22, 1988. This opinion is unpublished. Stringer v. Scroggy, Civil Action No. J87-0015(B). Petitioner

filed a notice of appeal and applied for a certificate of probable cause. The district court granted the requested certificate of probable cause.

Petitioner then pursued his appeal to the Court of Appeals for the Fifth Circuit. Briefs were filed, and oral argument was had. On December 22, 1988, the Fifth Circuit issued its opinion affirming the denial of relief by the district court. Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988)(Stringer I). A petition for panel rehearing and a suggestion for rehearing en banc were filed. These petitions were denied on January 20, 1989. Petitioner was granted a stay of the mandate in order to file his petition for writ of certiorari with this Court challenging the decision of the court of appeals.

On certiorari to this court from the decision of the Fifth Circuit petitioner

presented three questions. These questions read:

1. Whether the Fifth Circuit erred in failing to find that an instruction requiring the jury to unanimously find mitigating circumstances before considering them violates this Court's holding in Mills v. Maryland, ___ U.S. ___, 108 S.Ct. 1860 (1988).

2. Whether a United States Circuit Court of Appeals can automatically uphold a death sentence imposed after consideration of an unconstitutionally vague aggravating circumstance despite a state law requirement that the jury weight the statutory aggravating circumstances against all mitigating circumstances in determining the appropriate sentence.

3. Whether the Fifth Circuit Court of Appeals erred in holding that the trial court's refusal to grant a life option instruction did not result in a mandatory sentence of death by improperly limiting the jury's discretion.

Petition at i.

On April 16, 1990, this Court issued the following order:

The motion for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Clemons v. Mississippi, 494 U.S. ___ (1990).

Stringer v. Black, ___ U.S. ___, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990).

On remand to the Fifth Circuit for further consideration, petitioner presented two issues to the court of appeals. He presented the Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), issue and renewed his claim under Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 494 U.S. 433 (1990).¹

¹ While this case was pending in the Fifth Circuit on this latest reconsideration, the petitioner filed a second and successive state post-conviction petition with the Mississippi Supreme Court raising these same issues. Petitioner requested that the Fifth Circuit stay proceedings while this Court considered the present petition. The Fifth Circuit refused to stay consideration of the

On July 30, 1990, the Fifth Circuit issued its opinion on remand. The Court reinstated its prior affirmance of the denial of habeas relief holding that Clemons represented new law and would not be applied retroactively to petitioner's case. The court of appeals did not address the Mills/McKoy argument on remand. Stringer v. Jackson, 909 F.2d 111 (5th Cir. 1990). The petition for rehearing and suggestion for rehearing en banc were denied on September 10, 1990. The mandate in this case was issued instantter on July 30, 1990. The Court refused to recall this mandate.

Petitioner then filed the present petition for writ of certiorari presenting the five following questions:

issues presented on remand while the Mississippi Supreme considered whether it would entertain this second the petition. This successive petition is still pending before the Mississippi Supreme Court.

1. Did the court below disregard this Court's remand instruction to reconsider this case in light of Clemons v. Mississippi by applying a state rule of automatic affirmance that this Court found did not clearly exist in Clemons?

2. Can a federal court avoid grant relief from an unconstitutional death sentence by invoking a state "harmless error" rule (1) that was not imposed by the state courts, and (2) that is plainly unconstitutional under Clemons v. Mississippi, and Chapman v. California, 386 U.S. 19 (1967)?

3. Were Clemons v. Mississippi and Maynard v. Cartwright dictated by precedent, such that they cannot be considered "new rules" under Teague v. Lane?

4. Is the requirement of limited sentencing discretion a bedrock procedural element essential to the fairness of a capital sentencing proceeding?

5. Where the State deliberately waives the defense of nonretroactivity in one federal court forum, should it be permitted to raise this defense in the next?

Pet. for Cert. at i.

On May 13, 1991, this Court entered the following order:

The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to Question 3 presented by the petition.

Stringer v. Black, ____ U.S. ____, 111 S.Ct. 2009, 114 L.Ed.2d 97 (1991).

SUMMARY OF THE ARGUMENT

In the case before the Court, there is an opportunity to resolve the confusion and conflict created by the opinion in Lowenfield and the new rules established in Maynard and Clemons when applied to the Mississippi capital sentencing scheme. Contrary to the assertions of petitioner the Mississippi capital sentencing scheme is not comparable with those schemes found in Georgia, Florida, and Oklahoma. Instead, the Mississippi scheme is identical in its function to the scheme found in Louisiana and expressly approved in Lowenfield.

We submit that Maynard and Clemons represent the establishment of two new rules insofar as the Mississippi sentencing scheme is concerned. The holding in Maynard was contrary to established precedent of this Court in Lowenfield and the Court of Appeals for the Fifth Circuit as applied to the "especially heinous" aggravating factor under Mississippi's scheme. To the extent that Clemons represents an extension of Maynard it is also a new rule when applied to the case at bar, as both were decided after the direct appeal became final in this cause.

The opinion in Clemons also finds this Court, for the first time, limiting the manner in which the Mississippi court must treat the presence of an invalid aggravating circumstance when other valid circumstances remain. Long established reliance by the Mississippi court and the Federal courts in the Fifth Circuit on

Zant was obliterated with the opinion in Clemons. Thus, Clemons established a new rule limiting the process of consideration of invalid circumstances under the Mississippi scheme.

In addition, Clemons constitutionalizes the application of aggravating circumstances in a scheme that does not use those circumstances to narrow the class of death eligible defendants. This holding in Clemons is contrary to the holding of this Court in Lowenfield.

Therefore, the Court created a new rule barring the application of that part of Clemons and Maynard to cases pending on federal collateral review.

ARGUMENT

I. The Mississippi Capital Sentencing Scheme.

The Court is presented with the question of whether Maynard v. Cartwright, 486 U.S. 356 (1988), and Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), are new law under the rationale of Teague v. Lane, 489 U.S. 288 (1989), and its progeny² so as to bar their retroactive application to cases pending on applications for federal post-conviction relief.

To fully understand that both Maynard and Clemons represent new rules when applied to the Mississippi death penalty scheme, the Court must focus on the function of the "especially heinous"

² Penry v. Lynaugh, 492 U.S. 302 (1989); Butler v. McKeller, 494 U.S. ___, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990); Saffle v. Parks, 494 U.S. ___, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); Sawyer v. Smith, 497 U.S. ___, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990).

aggravating factor under the Mississippi scheme rather than the magic words "especially heinous, atrocious or cruel" themselves. In his brief Petitioner equates the use of this factor in Mississippi with its function under the Georgia statute. This ignores the fundamental differences in the two schemes.

In Mississippi, as opposed to Georgia, and for that matter, Florida and Oklahoma, the crime of capital murder is narrowly defined just as it is in Texas and Louisiana. In Miss. Code Ann., §99-3-19(2) (Supp. 1990), the crime of capital murder is narrowly limited to seven specific crimes.³ These crimes are not

³ The crimes which can carry the death sentence in Mississippi are limited to (1) the murder of a peace officer; (2) murder by a person under sentence of life imprisonment; (3) murder by the use of a bomb or explosive devise; (4) murder for hire or contract murder; (5) a killing in the course of a rape, burglary, kidnapping, arson, robbery, sexual batter,

the aggravating factors used in the sentencing phase of a capital murder trial, but the statutory definition of capital murder. In Mississippi no person is eligible for the death penalty unless he commits one of the crimes enumerated in the statute and is found guilty of that crime at the guilt phase of the trial. The constitutionally required "narrowing" function of the jury thus takes place during the guilt phase of a Mississippi capital murder trial. Only after a defendant is convicted of one of the narrowly defined offenses does he become eligible for consideration for imposition of the death penalty.

In the case at bar Stringer was indicted for and convicted of killing Ray

unnatural intercourse with any child under the age of twelve, or nonconsensual unnatural intercourse with mankind, or the attempt to commit such felonies; (6) the killing of a child during the felonious abuse of a child; (7) murder of an elected official.

McWilliams during the course of a robbery in the guilt phase of his trial. A killing in course of a robbery is one of the crimes statutorily defined as capital murder. See, Miss. Code Ann., §99-3-19(2)(e), (Supp. 1990). Thus, according to Mississippi law and the precedent of this Court, the constitutionally required narrowing function was fulfilled at this point.

After conviction of the specifically defined capital crime, the trial moves into the second or sentencing phase. In order to return a sentence of death during this second phase of the trial, the jury must additionally find, beyond a reasonable doubt, at least one of the eight (8) aggravating circumstances found in Miss. Code Ann., §99-19-101(5) (Supp. 1990).⁴

⁴ The aggravating factors under this statute are: that the capital offense was committed (a) by a person under sentence of imprisonment, (b) by a defendant who was previously convicted of

If the jury finds an aggravating factor then it must consider whether any mitigating circumstances exist.⁵ The jury then weighs any aggravating circumstances found

another capital offense or of a felony involving the use or threat of violence to the person, (c) by a defendant who knowingly created a great risk of death to many persons, (d) while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve, or nonconsensual unnatural intercourse with mankind or felonious abuse and/or battery of a child, or the unlawful use or detonation of a bomb or explosive device, (e) for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, (f) for pecuniary gain, (g) to disrupt or hinder the lawful exercise of any governmental function or the enforcement laws, and (h) the capital offense was especially heinous, atrocious or cruel.

⁵ The statutory mitigating circumstances are found in Miss. Code Ann., §99-19-101(6), (Supp. 1990). However, under Mississippi precedent, mitigating factors are not limited to those contained in the statute. Further, there is no burden of proof that must be met by a defendant prior to the jury's consideration of whatever the jury considers mitigating.

against the mitigating factors, if any. If the mitigating circumstances do not outweigh the aggravating circumstances the jury may, but is not required to, return a sentence of death.

In contrast, Georgia, Florida and Oklahoma, allow any person convicted of first degree murder to become eligible for a death sentence upon the jury's finding of one of the aggravating circumstances enumerated in their statutes during the sentence phase. In these states, it is the finding of an aggravating circumstance during the sentencing phase of the trial that is the constitutionally required narrowing agent in those schemes.

The scheme found in Mississippi was approved by this Court in Lowenfield v. Phelps, 484 U.S. 231 (1988). There this Court held:

Here, the "narrowing function" was performed by the

jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more. [Emphasis added.]

484 U.S. at 246.

As can be seen, the Mississippi and Louisiana schemes are indistinguishable in their narrowing function. Thus, the aggravating circumstances found in the sentencing phase of a Mississippi death penalty trial are "no part of the con-

stitutionally required narrowing process." Lowenfield.

If the aggravating circumstances are not part of the constitutionally required narrowing function, what are they? Respondents submit that they simply serve as a state law device to further channel the jury's discretion.

We would emphasize that no defendant in Mississippi could ever receive the death sentence under the circumstances found in Godfrey v. Georgia, 446 U.S. 420 (1980). Under the Georgia scheme, Godfrey was convicted of first degree murder. This did not make him eligible for the death penalty. Only upon the finding of the "outrageously wanton, vile, horrible or inhuman" aggravating factor during the sentencing phase did he become eligible for the imposition of the death sentence.

Under Mississippi law, the defendant would first have to commit and be con-

victed of one of the statutorily defined capital murders. Looking to the statute we find an "especially heinous" murder is not one of those crimes defined in the statute as capital murder. Not until conviction of one of the narrowly defined crimes do the statutory aggravating circumstances come into play as set out above. Therefore, no one can be sentenced to death in Mississippi simply by the jury finding that he committed an "especially heinous" murder as occurred in Godfrey.

In the case at bar, the jury, after convicting Stringer of a killing during the course of a robbery, moved on to the sentence determination phase of the trial. The jury found the following aggravating circumstances beyond a reasonable doubt:

1. The Defendant contemplated that life would be taken and/or the capital murder was intentionally committed and that the Defendant was engaged in an attempt to commit a robbery; and was committed for pecuniary gain.

2. The capital murder was committed for the purpose of avoiding or preventing the detection and lawful arrest of James R. Stringer, the Defendant.

3. The capital murder was especially heinous, atrocious or cruel.

Jury Verdict, JA at 17.

The jury then considered the mitigating circumstances presented in the case to determine if any existed. They weighed the aggravating circumstances against the mitigating circumstances and found that the aggravating circumstances outweighed the mitigating circumstances.⁶ Finally, as required by the instructions,

⁶ The statute in Mississippi requires that the jury find that the mitigating circumstances outweigh the aggravating before death can be imposed. However, the reversal of this wording in an instruction, as is the case here, to read that the aggravating circumstances must outweigh the mitigating circumstances has never been held to be error by the Mississippi Supreme Court.

the jury made the additional determination that Stringer should suffer death.

From the discussion above, it is obvious that the Mississippi scheme provides the constitutionally required narrowing during the guilt phase. The separate sentence determination process, in which aggravating factors are found, is not part of the constitutionally required narrowing function. The narrowing during the guilt phase and the consideration of aggravating factors in the sentence phase remove the Mississippi scheme from the category of weighing states like Florida and Oklahoma. See, Lowenfield. Two factors lead to this result. First, only certain murders are defined as capital murder. Second, aggravating circumstances are only found after conviction of one of the narrowly defined murder. The fact that the weighing process occurs after the constitutionally required narrowing takes

place decreases its importance in the determination of the sentence. In fact it takes it out of the realm of a weighing statute. See, Flamer v. State, 490 A.2d 104, 134-136 (Del. 1984), cert. denied, 474 U.S. 856 (1985).

A third factor cannot be ignored. After the weighing process takes place, the jury does not automatically sentence the defendant to death. There is another step in the process. At this point the jury must determine whether or not the death penalty should be imposed independent of the weighing process. Even if the jury finds that the aggravating circumstances outweigh the mitigating factors it is not required to sentence a defendant to death. The jury must make an independent determination that the defendant should be sentenced to death. See, Jury Instruction 18, JA at 12; Sentencing Verdict, JA at 18.

Given the clearly outlined differences between the Mississippi scheme and those in Georgia, Florida and Oklahoma, we again ask why the Mississippi scheme, so identical in its narrowing operation, has been treated differently from that found in Louisiana. We submit that Clemons, to the extent that it gives constitutional significance to the aggravating circumstances found under the Mississippi scheme is incorrectly decided.

II. Retroactive Application Or Not?

In order for the bar of non-retroactivity to be applied to a certain case, that case must have been final on direct appeal at the time the case containing the new rule was decided. This Court has stated that "final" on direct appeal means that certiorari has been denied on direct review or the time for filing certiorari from direct review has expired. Linkletter v. Walker, 381 U.S. 618, 622, n. 5

(1965). Stringer's case was final on direct appeal on February 18, 1985, when certiorari was denied by this Court. Stringer v. Mississippi, 469 U.S. 1230 (1985). Maynard was decided on June 6, 1988, and Clemons was decided on March 28, 1990, both well after the decision in Stringer v. State was final. There can be no question that the case at bar meets the first criteria for falling under Teague's bar to retroactive application of a new rule.

The next criteria that must be met, the primary focus of the present inquiry, is whether or not the rules announced in Maynard and Clemons are new rules within the meaning of Teague. In Saffle v. Parks, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990), the Court stated:

The explicit overruling of an earlier holding no doubt creates a new rule; it is more difficult, however to determine whether we announce a new rule

when a decision extends the reasoning of our prior cases.

108 L.Ed.2d at 424.

A new rule is defined by this Court as those rules that were not "dictated by precedent existing at the time the defendant's conviction became final." Teague, supra. at 301 [Emphasis the Court's.] This definition was expounded upon in Butler v. McKellar, 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed.2d 347 (1990), where the Court held:

But the fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under Teague. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts. In Roberson, for instance, the Court found Edwards controlling but acknowledged a significant difference of opinion on the part of several lower courts that had considered the question

previously. 486 U.S., at 679, n 3, 100 L.Ed.2d 704, 108 S.Ct. 2093. That the outcome in Roberson was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits noted previously. It would not have an illogical or even a grudging application of Edwards to decide that it did not extend to the facts of Roberson. We hold, therefore, that Roberson announced a "new rule."

108 L.Ed.2d at 356-357.

With these basic tenets in mind we would submit that both Maynard and Clemons announced two separate and distinct new rules in so far as the Mississippi death penalty scheme is concerned.

A. Maynard/Godfrey.

Without question this Court stated in Maynard, that "Godfrey controls this case." 486 U.S. at 363. However, under this Court's decisions that does not end the inquiry. The question then becomes whether the decisions in Maynard and

Godfrey applied to the Mississippi capital sentencing scheme were susceptible to debate among reasonable minds. We submit that they were, as evidenced by the Fifth Circuit's opinions in Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), cert. denied, 480 U.S. 951 (1987), and Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987), cert. denied, 483 U.S. 1033, reh. denied, 483 U.S. 1036 (1987).

In Johnson v. Thigpen, the court below held that the principles of Godfrey which underpin Maynard, do not apply to the Mississippi death sentencing scheme. Chief Judge Clark's opinion reads:

The structural differences between the Mississippi statute and the Georgia statute distinguish Godfrey from this case. Georgia does not narrow the class of persons eligible for the death penalty by defining specific classes of murders that are capital murder. Gregg, 428 U.S. at 196, 96 S.Ct. at 2936. Rather, the aggravating circumstances are the sole statutory narrowing mechanism. id. at 196-97, 96 S.Ct. at 2936.

Thus, in Godfrey when the Georgia Supreme Court did not properly limit the "outrageously or wantonly vile" aggravating circumstance, there was indeed "no principled way to distinguish [Godfrey's] case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433, 100 S.Ct. at 1767. The Georgia court had failed to make the only statutory factor present in Godfrey a narrowing one. For that reason the broad construction of the aggravating circumstance by the Georgia Supreme Court resulted in the death sentence being unconstitutional.

No such failure exists in the present case. Even given Mississippi's broadened construction of the especially heinous aggravating circumstance, and ignoring the other aggravating circumstance found by the jury, the Mississippi capital murder statute still narrows the class of persons eligible for the death penalty. In the present case, for example, Johnson was convicted of the murder of a peace officer acting in his official capacity. This element of a capital offense in Mississippi is a statutory aggravating circumstance in Georgia. Ga. Code § 27-2534.1(b)(8), quoted in Godfrey, 446 U.S. at 423 n.2, 100 S.Ct. at 1762 n.2. The definition of capital murder in

Mississippi serves the same narrowing functions as the parallel aggravating circumstance would in Georgia.

In fact, the Mississippi death penalty statute, as applied in this case, is indistinguishable from the Texas statute. In approving the Texas statute in Jurek, the Supreme Court recognized that, by defining capital murder narrowly, "in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed." 428 U.S. at 270, 96 S.Ct. at 2955. As this court stated in Welcome v. Blackburn, 793 F.2d 672, 677 (5th Cir. 1986):

By classifying first degree murder as including certain aggravating circumstances the state has narrowed the class of those subject to the death penalty as effectively as if it allowed a broader class to be convicted but then limited those within the broader class who could be sentenced to death to only persons whose crimes are accompanied by specific aggravating circumstances.

The Mississippi statute, unlike the Texas statute, provides the added protection of requiring proportionality review by the state supreme court. Compare Miss. Code Ann. §99-19-105(3)(c) (Supp. 1985) with *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), See *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 35418, 3429, 77 L.Ed.2d 1134 (1983) (plurality opinion); *Stephens*, 462 U.S. at 879-80, 103 S.Ct. at 2743. Thus, the Mississippi death penalty statute satisfies constitutional requirements despite the broad construction placed on the especially heinous aggravating circumstance by the Mississippi Supreme Court.

We do not base this decision on the harmless error doctrine of *Stephens*, 462 U.S. at 884-91, 103 S.Ct. at 2746-50. See *Barclay*, 463 U.S. at 951 n. 8, 103 S.Ct. at 3425 n. 8. Mississippi's choice to apply a broadened construction to the especially heinous aggravating circumstance is not constitutional error. If the change in construction is an error at all, it is an error of state law that is not cognizable on habeas review. *Harris*, 104 S.Ct. at 875; *Barclay*, 463 U.S. at 957-58, 103 S.Ct. at 3428-29. [Emphasis added.]

806 F.2d at 1248-49.

The Godfrey issue was raised in Johnson's petition for certiorari from the court of appeal's decision. This Court denied certiorari, and Johnson was executed on May 20, 1987. *Johnson v. Thigpen*, 480 U.S. 1033 (1987).

The Mississippi Supreme Court relied on the decision in *Johnson v. Thigpen*. In his concurring decision in *Jones v. State*, 517 So.2d 1295 (Miss. 1987), Justice James Robertson, who prior to the *Jones* decision questioned the failure to give a limiting instruction to the jury on the "especially heinous" aggravating factor in several dissenting opinions, stated:

The Johnson discussion takes place in the context of a federal constitutional claim that our "especially heinous, atrocious or cruel" aggravating circumstance as applied fails to perform the narrowing function mandated by such cases as *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) and progeny. Johnson finds no constitutional error because, leaving aside aggravating circumstances, our

statutory definition of capital murder narrows the class of persons eligible for the death penalty in a constitutionally adequate manner. Compare Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). We have searched Johnson in vain for the slightest hint that the Fifth Circuit, as an external observer, considers that our "especially heinous, atrocious or cruel" aggravating circumstance -- as we have administered it for the past five years -- contributes one iota to the goal of fair and rational selection, from all capital murderers, of those whose crimes are qualitatively sufficiently reprehensible that they should be exposed to judicial consideration of the penalty of death.

517 So.2d at 1295.

Justice Robertson's "reluctant[]" concurrence in Jones clearly indicates that the State supreme court relied on the holding in Johnson v. Thigpen that the "especially heinous" aggravating factor, or for that matter any statutory aggravating factor, was not constitutionally sig-

nificant in the selection of the those who were sentenced to death.⁷

In Evans v. Thigpen, 809 F.2d at 241, the Fifth Circuit, adopting the district court's rationale regarding the "especially heinous" aggravating factor in Evans v. Thigpen, 631 F.Supp. 274 (S.D. Miss. 1986), held:

Under current precedent of the Fifth Circuit, there is no constitutional requirement that the trial court define the terms "especially heinous, atrocious, or cruel" in its instructions to the jury. Moore v. Maggio, 740 F.2d 308, 321 (5th Cir. 1984). As stated in Moore:

The United States Supreme Court has thus far declined to require that the jury must be instructed of the narrow construction of a potentially overbroad aggravating circumstance, such as whether the crime is

⁷ We state this with the full knowledge that this Court vacated the sentence in Jones for reconsideration partially in light of Maynard. Jones v. Mississippi, 487 U.S. 1230 (1988). However, Jones was a direct appeal case.

"especially heinous, atrocious, or cruel." Instead, the Court has looked to state appellate courts "to weed out those cases in which an overly broad construction is applied by the jury" See *Williams v. Maggio*, 679 F.2d 381 410 (5th Cir. 1982) (en banc) (Randall, J., dissenting) cert. denied, 463 U.S. 1214, 103 S.Ct. 3552, 77 L.Ed.2d 1399 (1983).

. . .

Moreover, the "especially heinous, atrocious or cruel" nature of the capital offense was only one of several statutory aggravating circumstances relied upon by the State and found by the jury. This contrasts sharply with the situation present in *Godfrey v. Georgia*, 446 U.S. 420 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) where the sole aggravating factor said to support the death penalty was Georgia's equivalent statutory provision, which could not be constitutionally applied to the facts present there. See *Barclay v. Florida*, 463 U.S. 939, 947 n. 5, 103 S.Ct. 3418, 3423 n. 5, 77 L.Ed.2d 1134, 1142 n. 5 (1983) (plurality opinion). In its alternative holding that the death penalty should be upheld

in this case even assuming the "heinous, atrocious, or cruel" factor was not validly applied, the Mississippi Supreme Court held that the three other statutory aggravating circumstances found by the jury, i.e., murder in the course of robbery, for the purpose of avoiding arrest, and by a person under a sentence of imprisonment, were supported by "overwhelming" evidence. 422 So.2d at 743; 441 So.2d at 522. As we have noted above, there was absolutely no constitutional error with respect to any of these other aggravating factors. Under the current precedent of the Fifth Circuit, a death sentence will not be overturned on habeas review because of the constitutional infirmity or invalidity of one aggravating circumstance so long as the other statutory aggravating factors are supported by the evidence. *Watson v. Blackburn*, 756 F.2d 1055, 1057-58 (5th Cir. 1985) (describing principle as "settled law"); *Moore v. Maggio*, 740 F.2d 308, 321 (5th Cir. 1984) (rejecting argument that submission of invalid aggravating circumstance "skewed the balance" struck by jury in voting for death); *Knighton v. Maggio*, 740 F.2d 1344, 1351-52 (5th Cir. 1984); *Williams v. Maggio*, 679 F.2d 381, 388-90 (5th Cir. 1982) (en banc).⁵ Compare *Collins v. Lockhart*, 754 F.2d 258, 265-68 (8th Cir. 1985). [Footnote 5 omitted.]

631 F.Supp. at 284-285.

This question was raised on certiorari to this Court, and certiorari was denied. Evans was executed on July 7, 1987.

Prior to the time the decision in Stringer v. State become final, neither the federal courts in the Fifth Circuit nor for that matter this Court ever questioned the application of the "especially heinous" factor as employed in the Mississippi scheme on the basis of Godfrey. To the contrary, the lower federal courts expressly stated that Godfrey did not have any application under the Mississippi statutory scheme for imposing the death sentence. This Court tacitly approved by the denial of certiorari on the question when raised, allowing executions to take place. To this date the precedent announced in Johnson v. Thigpen and Evans v. Thigpen has never been expressly

overruled or directly questioned by the Fifth Circuit or by this Court.

After the decision in Maynard, we find other courts of appeals differing on whether the rule announced there is new. Supporting our position that the rule in Maynard is new, we invite the Court's attention to the opinion of the Tenth Circuit in Coleman v. Saffle, 869 F.2d 1377 (10th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1835, 108 L.Ed.2d 964 (1990). While discussing a question of abuse of the writ, the Tenth Circuit, held:

It cannot reasonably be disputed that our decision in Cartwright was a new and significant development in Oklahoma law. . . . Although our holding in Cartwright is well supported by precedent, neither this court nor the Oklahoma courts previously had given any reliable indication that the state's construction of this particular circumstance might be invalid. [Citations omitted.] [Emphasis added.]

869 F.2d at 1381.

Because no court or judge had ever questioned the validity of the construction placed on the "especially heinous" aggravating factor Coleman was allowed to escape a claim that he was abusing the writ of habeas corpus by filing a second habeas petition.

To the contrary, and showing that reasonable minds differ on the question before the Court, we look to the decision of the Eighth Circuit in Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989), cert. denied sub nom, Delo v. Newlon, ___ U.S. ___, 110 S.Ct. 3301, 111 L.Ed.2d 810 (1990). The Eighth Circuit held:

The first rule sought by Newlon and opposed by the State is that the imposition of the death penalty in this case, based on the jury's finding that the murder was "outrageously or wantonly horrible, or inhuman in that it involved depravity of mind," did not "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance'" for purposes of

Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1765, 64 L.Ed.2d 398 (1980) (plurality opinion), quoting Gregg v. Georgia, 428 U.S. 153, 198, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1976). The rule in question is not a "new rule" under Teague and Penry because it is dictated by case law existing at the time Newlon's conviction became final.

885 F.2d at 1333.

We submit that the differences of opinions between the Fifth, Eighth and Tenth Circuits on whether Godfrey applied in Mississippi and whether Maynard was a new rule show that the outcome of this question "was susceptible to debate among reasonable minds." 108 L.Ed.2d at 356. The decisions of the Fifth Circuit on the application of Godfrey and Maynard to the Mississippi scheme of imposing the death sentence do not represent an "illogical or even a grudging application" of the rational of these cases in light of this Court's decision in Lowenfield. Butler, 108 L.Ed.2d at 357. Even though this

Court stated that Maynard was "controlled" by Godfrey, the application of Godfrey and Maynard to the Mississippi capital sentencing scheme was, as we have shown, "susceptible to debate among reasonable minds." Butler, 108 L.Ed.2d at 356. Therefore, we submit that the decision in Maynard created a new rule insofar as the application of the "especially heinous" aggravating factor in Mississippi is concerned.⁸ Respondents would submit these constitute sufficient grounds to find that the rule announced in Godfrey and Maynard is a new rule as it applies to the Mississippi scheme for imposing the sentence of death.

B. Clemons.

Looking next to whether Clemons announces a new rule, we must analyze what

⁸ As can be seen from our discussion under Part B, *infra*, we contend that not until Clemons was Maynard directly applied to the Mississippi scheme and that it was applied incorrectly.

that decision actually does. The decision in Clemons is easily be divided into two parts.

One, the decision, for the first time, places limits on how the Mississippi Supreme Court can treat the invalidity of an aggravating circumstance that go beyond those required in Zant v. Stephens, 462 U.S. 862 (1983). Imbedded in this holding is the first application of Godfrey and Maynard to the Mississippi scheme of imposing the death sentence.⁹ The import of this holding is that it constitutionalized the function of aggravating circumstances under the

⁹ Respondents realize that the Mississippi Supreme Court invited this scrutiny by addressing the decision in Maynard and its effect on the Mississippi scheme. The conflicting signals sent by this Court by allowing the executions of Johnson, Evans and Edwards in the face of similar questions and the vacation of the sentence in Jones certainly gave the state court cause to feel that it need to address the question of the "especially heinous" aggravating factor in light of Maynard.

Mississippi scheme for the first time in the face of the holding in Lowenfield. We submit this is the first new rule announced in Clemons, and the one that is central to the inquiry presently before the Court.

Second, the Court held that an appellate court in a weighing state could save a sentence of death by reweighing the aggravating and mitigating circumstances or by applying a harmless error analysis to the sentencing process. This also announces a new rule where the Mississippi scheme is concerned. However, this second rule is not the focus of the inquiry before the Court in this case.

The Clemons discussion begins with this revealing statement:

We deal first with petitioner's submission that it is constitutionally impermissible for an appellate court to uphold a death sentence imposed by a jury that has relied in part on an invalid aggravating circumstance. In Zant v. Stephens,

462 U.S. 862, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983), we determined that a State like Georgia, where aggravating circumstances serve only to make a defendant eligible for the death penalty and not to determine the punishment, the invalidation of one aggravating circumstance does not necessarily require an appellate court to vacate a death sentence and remand to a jury. We withheld opinion, however, "concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." Id. at 890, 77 L.Ed.2d 235, 103 S.Ct. 2733. In Mississippi, unlike the Georgia scheme considered in Zant, the finding of aggravating factors is part of the jury's sentencing determination, and the jury is required to weigh any mitigating factors against the aggravating circumstances.² Although, these differences complicate the questions raised, we do not believe that they dictate reversal in this case. [Footnote 2 omitted.] [Emphasis added.]

108 L.Ed.2d at 736.

This statement alone answers the question at hand. It stands to reason if the question answered in Clemons had been reserved for decision at a later date by Court in Zant. both rules announced in Clemons are new rules not dictated by prior precedent insofar as the Mississippi scheme is concerned.

The Tenth Circuit certainly believed that the question at issue in the case sub judice had never been answered. In the original opinion in Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1989) (en banc), the Tenth Circuit stated:

We agree that "Zant and Barclay leave open the question of whether a sentencing authority that must weigh all statutory factors may consider constitutionally invalid aggravating circumstances." Special project, Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency, 69 Cornell L. Rev. 1129, 1181 (1984).

822 F.2d at 1482.

Clearly, the Tenth Circuit felt that the question was left open as to how a "weighing" state sentencing authority should treat invalid aggravating circumstances. The Mississippi Supreme Court had always relied on the decision in Zant as authority for upholding a sentence of death when there was the possibility of an invalid aggravating factor. The Mississippi Supreme Court had never found that the "especially heinous" aggravating factor was invalid prior to Clemons v. State, 535 So.2d 1354 (Miss.1988) and that was only in the face of Maynard. The state court had always used the authority of Zant as an alternative holding that even if the circumstance were invalid, there were other valid aggravating circumstances that would support the sentence of death. Johnson v. State, 511 So.2d 1333, 1336-1339 (Miss. 1987), rev'd on other grounds sub nom, Johnson v. Mis-

Mississippi, 486 U.S. 578 (1988); Tokman v. State, 435 So.2d 664, 670 (Miss. 1983), cert. denied, 467 U.S. 1256 (1984).

After the decision in Maynard, the Fifth Circuit, without a mention of Johnson v. Thigpen, held in Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988), cert. denied, 489 U.S. 1059, reh. denied, 490 U.S. 1032 (1989), that the invalidation of one aggravating circumstance did not require the vacation of the death penalty so long as there were other valid aggravating circumstances remaining, citing, Rault v. Butler, 826 F.2d 299 (5th Cir.), cert. denied, 483 U.S. 1042 (1997); Celestine v. Butler, 823 F.2d 74 (5th Cir. 1987) and Evans v. Thigpen, supra. See, Watson v. Blackburn, 756 F.2d 1055, 1057-58 (5th Cir. 1985); Moore v. Maggio, 740 F.2d 308, 321 (5th Cir. 1984) (rejecting argument that submission of invalid aggravating circumstance "skewed the

balance" struck by jury in voting for death); Knighon v. Maggio, 740 F.2d 1344, 1351-52 (5th Cir. 1984); Williams v. Maggio, 679 F.2d 381, 388-90 (5th Cir. 1982) (en banc). The Fifth Circuit did not rely on nor distinguish its opinion in Johnson v. Thigpen, in denying relief in Edwards. The Court chose instead to affirm under the alternative rationale of the existence of remaining valid aggravating circumstances that would support the death sentence. Discussing Maynard, the Court of Appeals distinguished it, holding:

Maynard v. Cartwright, ___ U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), just decided by the Supreme Court does not undermine this conclusion. In Maynard, the petitioner was sentenced to death following a finding by an Oklahoma jury of two statutory aggravating circumstances: "an especially heinous, atrocious, or cruel" murder and the defendant "knowingly created a great risk of death to more than one person." The Supreme Court determined that the first aggravating circumstance was

invalid; the second remained unchallenged. The Court, however, instead of reinstating the death penalty, approved a remand of the case to the Oklahoma Court of Criminal Appeals. But the opinion makes it clear that the Court approved this remand because Oklahoma law was unclear on whether the sentence of death should be set aside if one of the aggravating circumstances was found invalid and others remained unchallenged. Consequently, the case was remanded to the Oklahoma court to determine whether the sentence of death should be set aside if one of the aggravating circumstances was found invalid and others remained unchallenged. Consequently, the case was remanded to the Oklahoma court to determine as a matter of state law whether the sentence should be set aside. Unlike Oklahoma law, however, Mississippi law is clear that one invalid aggravating circumstance will not suffice to overturn a death penalty where other valid aggravating circumstances remain. Edwards v. State, 441 So.2d 84, 92 (Miss. 1983). [Emphasis added.]

849 F.2d at 211, n. 7.

Edwards raised this claim in his petition for writ of certiorari from the lower

court's decision. Certiorari was denied. Edwards was executed June 20, 1989.

Likewise, when we look to the original decision in Stringer I and the opinion in Hill v. Black, 891 F.2d 89 (5th Cir. 1989), on petition for rehearing, we find the continued assertion that Maynard error will not vacate a sentence of death because the Mississippi scheme of imposing the sentence of death allows for the affirmance of a sentence based on the remaining valid aggravating factors.

In Stringer I, the court below stated that its earlier decision in Edwards v. Scroggy had assumed for the sake of argument that the "especially heinous" argument was invalid. 862 F.2d at 1113. The Court then relied on the decision in Edwards v. Scroggy as one ground for upholding the denial of habeas relief on

this question.¹⁰ Continuing, the court then proceeded to make an analysis under Zant holding:

We believe that the Mississippi capital punishment scheme, as applied in this case passes constitutional muster for virtually the same reasons articulated by the Supreme Court in Zant.

862 F.2d at 1114.

As one of the foundations of this holding, the Fifth Circuit held that even

¹⁰ We pointed out in our response to the petition for certiorari in this case that no claim was raised at trial or on direct appeal in state court to the application of the "especially heinous" aggravating factor. On state post-conviction review the Mississippi Supreme Court held the claim to be procedurally barred for not raising the claim at trial or on direct appeal. Stringer v. State, 485 So.2d at 275. Likewise, the Federal district court held this claim to be procedurally barred from federal review. The district court alternatively held that the claim was without merit, citing Johnson v. Thigpen. Stringer v. Scroggy, 675 F.Supp. at 366. The Fifth Circuit mentioned the procedural bar and then addressed the merits of the claim. Stringer v. Jackson, 862 F.2d at 111. We continue to submit that this claim is independently procedurally barred from consideration by the Federal courts.

though Mississippi could be considered a weighing state, the distinction in the manner in which it considered aggravating and mitigating circumstances was one without a difference. The court held:

That the jury was instructed to weigh statutory aggravating circumstances against mitigating circumstances does not alter the federal decision. We see no difference, other than one in semantics, between instructing a jury to weigh aggravating against mitigating circumstances in determining the sentence and instructing a jury to consider all aggravating and mitigating circumstances in determining the sentence and instructing a jury to consider all aggravating and mitigating circumstances in deciding on the sentence. Had the Jury been instructed as the jury was in Zant, it would have been constitutionally authorized to consider as aggravating all the facts and circumstances surrounding the crime -- for instance whether it believed the crime to be heinous, atrocious, or cruel -- and to use those considerations in arriving at a sentencing decision. That it was not so instructed, that is, that the court limited its consideration to only statutory aggravating circumstances, is a matter of state law only. Zant,

1103 S.Ct. at 2743 n. 17. We look to Mississippi to decide the impact of the invalid aggravating circumstance on Stringer's death sentence. Mississippi has held that the invalidation of an aggravating circumstance will not affect the death sentence so long as there is at least one valid aggravating circumstance remaining. Here, two valid aggravating circumstances remained. We overrule Stringer's argument. [Emphasis added.]

862 F.2d at 1115.

While not cited in Stringer I, this reasoning is fully supported by the earlier decision in Franklin v. Lynaugh, 487 U.S. 164 (1988). There a plurality of this Court noted:

We also repeat our previous acknowledgment, that -- as a practical matter -- a Texas capital jury deliberating over the Special Issues is aware of the consequences of its answers, and is likely to weigh mitigating evidence as it formulates these answers in a manner similar to that employed by juries in "pure balancing" States. See Adams v. Texas, supra, at 46. Thus, the differences between the two systems may be even less than it

appears at first examination.
[Emphasis added.]

487 U.S. at 182 n. 12.

The language in Franklin and Stringer I also formed one of the basis for holding that Clemons was new law in the Fifth Circuit's opinion in Smith v. Black, 904 F.2d 950, 985 (1990). Thus, there was a clear indication that the difference between how a weighing state handled an invalid circumstance as opposed a state which did not required weighing was slight. These opinions ratify the Mississippi Supreme Court's reliance on the precedent found in Zant in its treatment of invalid aggravating circumstances.

The fact that other courts of appeals found that the consideration of invalid aggravating circumstances was a matter of state law supports our claim that Clemons announces a new rule. Looking to Eighth Circuit's decision in Collins v. Lockhart,

754 F.2d 258, 265-268 (8th Cir. 1985), we find it holding that if a single aggravating factor were found to be invalid the death penalty must be set aside because of the operation of state law. In reaching this decision the Eighth Circuit held that its opinion was not in conflict with the holdings of the Fifth and Eleventh Circuits because they were dealing with different state statutory schemes.

When the Tenth Circuit decided Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987), it recognized that there was a distinction in the Mississippi statute that removed it from the reach of its decision Cartwright v. Maynard. The Tenth Circuit opinion states:

Therefore, the Oklahoma statute is unlike the statutes in those states in which aggravating circumstances are employed to narrow the class of first degree murders that are eligible for the death penalty. See Zant, 463 U.S. at 875, 103 S.Ct. at 2741 (Georgia); Andrews, 802 F.2d at 1263 (Utah); Welcome v.

Blackburn, 793 F.2d 672, 677 (5th Cir. 1986) (Louisiana). Cf. Johnson v. Thigpen, 806 F.2d 1243, 1248 (5th Cir. 1986), cert. denied, U.S. , 107 S.Ct. 1618, 94 L.Ed.2d 802 (1987) (Mississippi). [Emphasis added.]

822 F.2d at 1480.

Therefore, until the decision in Clemons the lower Federal courts clearly regarded the consideration of invalid aggravating circumstances was a matter of state law.

In the case at bar the Fifth Circuit did not make an analysis of why Clemons would not be retroactively applied to Stringer. Instead, the court cited to and relied on its detailed opinion on the question found in Smith v. Black, 904 F.2d 950 (5th Cir. 1990). There the Fifth Circuit held:

Clemons rejected the contention that a Mississippi sentence partially predicated on an invalid aggravating circumstance must as a constitutional matter be vacated and remanded to a sentencing jury, but also limited for the first time Mississippi's practice of

supporting a death sentence on the basis of a remaining, valid aggravating factor. The Court found that despite recitation of the proper limiting construction of the "especially heinous" aggravating factor, examination of the facts underlying sentencing, and the suggestion that the "'punishment of death is not too great when the aggravating and mitigating circumstances are weighted against each other,'" the Mississippi Supreme Court's reference to its practice

... can be read as a rule authorizing or requiring affirmance of a death sentence so long as there remains at least one valid aggravating circumstance. if that is what the Mississippi Supreme Court meant, then it was not conducting appellate reweighing as we understand the concept. An automatic rule of affirmance in a weighing State would be invalid under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), for it would not give defendants the individualized treatment

that would result from actual reweighing of the mix of mitigating and aggravating circumstances.

904 F.2d at 984.

Without question Clemons was the first time that this Court directly placed any limits on the manner in which the Mississippi Supreme Court was to deal with the invalidity of an aggravating factor.¹¹ As the Fifth Circuit, recognizing this fact, continued in Smith:

Not until Clemons v. Mississippi did the United States Supreme Court specifically apply Godfrey and Maynard to the Mississippi aggravating circumstance, and before that application it could at least be said the constitutional practice of Mississippi's redemptive

¹¹ In Johnson v. Mississippi, 486 U.S. 578 (1988), two members of this Court in a concurring opinion stated that on remand that the state court must decide whether or not to remand for resentencing before a jury or decide for itself "the appropriate sentence without reference to the inadmissible evidence, thus undertaking to reweigh the two untainted aggravating circumstances against the mitigating circumstances." 486 U.S. at 591.

status was ambiguous making reasonable for Teague purposes the rule preceding Clemons. See Butler, ___ U.S. ___, 110 S.Ct. at 1217, Saffle, ___ U.S. ___, 110 S.Ct. 1260-61. In Evans v. Thigpen, 809 F.2d 239, 241 (5th Cir.)(dicta), cert. denied, 483 U.S. 1033, 107 S.Ct. 3278, 97 L.Ed.2d 782 (1987), Edwards v. Scroggy, 849 f.2d 204, 211 n. 7 (5th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1328, 103 L.Ed.2d 587 (1989), and most recently in Stringer v. Jackson, 862 F.2d 1108, 1113-15 (5th Cir. 1988), which the Supreme Court has vacated and remanded for consideration in light of Clemons v. Mississippi, see ___ U.S. ___, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990), various panels of this court have sustained death sentences premised in part on an invalid aggravating circumstance by recognizing the Mississippi practice of sustaining verdicts when supported by at least one valid aggravating circumstance. Under the practice, perhaps first represented in Evans v. State, 422 So.2d 737, 743 (Miss. 1982), cert. denied, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 314 (1983), the Mississippi Supreme Court typically would recognize the problematic constitutionality of the "especially heinous, atrocious, or cruel" aggravating circumstance, possibly review the sentence for proportionality and under the Coleman limiting

construction of the circumstance and uphold the sentence if in any event the jury had found at least one other valid aggravating circumstance. [Citations omitted.]

This practice relied in part on decisions of the Supreme Court subsequent to Lockett and Eddings (and subsequent by a matter of months to the point at which Smiths conviction became final) that might have appeared to confirm the constitutionality of the Mississippi practice. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), upheld a death sentence administered under the Georgia sentencing scheme when one of three aggravating circumstances found by the jury was subsequently held invalid by the Georgia Supreme Court while the other two aggravating circumstances were specifically upheld. Although the opinion recognized the potential differences attending a "weighing" state, id. at 873 n. 12, 890-91, 103 S.Ct. at 2741 n.12, 2750, the chief import of the decision was often viewed as confirming the constitutional latitude afforded the common state practice of redeeming death sentences when more than one aggravating circumstance was present, and Zant was relied upon by this court and the Mississippi Supreme Court in warranting the Mississippi

practice. [Citations omitted.]
[Emphasis added.]

904 F.2d at 984-985.

As we pointed out in the section dealing with Godfrey/Maynard retroactivity, Clemons represents the first application of the Godfrey/Maynard rule to the consideration of the "especially heinous" aggravating circumstance in the Mississippi scheme. The holding that this circumstance was unconstitutionally vague without a limiting definition was contrary to all prior rulings of this Court and the lower federal courts. See, Part A, supra.

After pointing out the practice of considering invalid aggravating circumstances as perceived by the Fifth Circuit in prior precedent, Judge King continued her analysis by stating that while Barclay v. Florida, 463 U.S. 939 (1983), and Maynard, may have "suggested reservations regarding certain circumstances in 'weighing' states," these "reserva-

tions distinguishing schemes like that administered Mississippi" could not be said to be "legal determinations that control the outcome of [Stringer's] case" and were certainly not the "law applicable at the time his conviction became final." 904 F.2d at 985.

Concluding, Smith holds:

[T]he Teague doctrine in part tolerates the diversity of state schemes by accepting the fact that various jurisdictions will not always correctly anticipate the ultimate constitutional significance of every detail. Instead, "reasonable, good-faith interpretations of existing precedents" are sufficient to prevent the application of new law. Butler, 110 S.Ct. at 1217; see also Sawyer v. Smith, ___ U.S. ___, 110 S.Ct. at 2828-29 (incorrect characterizations by Mississippi Supreme Court further indicates extent to which subsequent constitutional ruling was not dictated). We hold consequently, that the application of Clemons to Smith would involve the application of a "new rule" on collateral review a practice normally barred by Teague.

904 F.2d at 986.

In case after case the practice of the Mississippi Supreme Court in dealing with the "especially heinous" aggravating circumstance and the treatment of invalid circumstances was allowed to stand. Not until Clemons did this Court place any limits on the manner in which the Mississippi court was to consider invalid circumstances or constitutionalize the function of aggravating circumstances in Mississippi. All prior decisions indicated that the treatment was correct or that it was totally a state law matter. Thus, the limitation placed on the consideration of aggravating circumstances that were found to be invalid by the Mississippi Supreme Court created a new rule within the meaning of Teague.

The question then arises, what about the citation of Clemons in Parker v. Dugger, 498 U.S. ___, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991)? Without question

Parker was a case pending federal collateral review when Clemons, a direct appeal case, was decided.¹² Normally, there is no application of new rules to cases pending of collateral review. Teague. We submit that the application of that part of Clemons that allowed for appellate reweighing in the Florida scheme was not the application of a new rule as it applies to that scheme.¹³

¹² We note that this Court's decision in Collins v. Youngblood, ___ U.S. ___, 110 S.Ct. 2715 (1990) makes clear that a court need not raise the Teague bar on its own motion, although it may do so. The non-retroactivity of Clemons was not urged by Florida in Parker and this Court did not address the issue of retroactivity in its opinion. Since the resolution of the retroactivity question is at best ambiguous, we submit that Parker does not represent a case that would have an effect on the decision of the Fifth Circuit holding that Clemons will not to be retroactively applied to cases pending on federal post-conviction review.

¹³ We submit the decision in Wainwright v. Goode, 464 U.S. 78 (1983), foretold that part of Clemons that allows appellate reweighing of aggravating and

As previously stated, Clemons is a two part decision. The part not in question here, but relied on by this Court in Parker, required appellate reweighing or harmless error analysis to save a death sentence in a weighing state. Whether this part of Clemons constitutes a new rule as to the Florida scheme is not the

mitigating circumstances as far as the Florida scheme is concerned. In Goode, the Florida Supreme Court, according to this Court, stated:

"[C]omparing the aggravating circumstances and mitigating circumstances with those in other capital cases and weighing the evidence in the case subjudice, or judgment is that death is the proper sentence." Goode v. State, 365 So.2d, at 384-385. [Emphasis added.]

468 U.S. at 86.

This Court then characterized this action as a reweighing of aggravating and mitigating circumstances. Florida made no mention whether it was reweighing the aggravating and mitigating circumstances in that case, only that it was comparing them with those found in other cases. This Court found that a reweighing had been done, but did not require such.

question that this Court is presented with in the case at bar. The question to be decided here is whether this Court's holding that Mississippi could no longer rely on Zant when affirming a death sentence based in part on an invalid aggravating circumstance is a new rule. This part of Clemons was not cited to or relied upon in Parker.¹⁴

Mississippi was told in Clemons, for the first time, that it must do a reweighing or make a harmless error analysis before it could affirm a sentence of death based on a invalid aggravating factor even though prior precedent had led it to believe that their aggravating factors played no part in the constitutionally

¹⁴ The remaining citations to Clemons in Parker are to considerations of individualized sentencing determinations. This is certainly not a novel consideration raised or established as a rule in Clemons. Parker concerns what mitigating evidence must be considered by a sentencing authority, Clemons concerns how this is to be done.

required narrowing process. Thus, this Court's citation of Clemons and the second part of that decision in Parker does not force retroactive application of a new and different rule to Stringer.¹⁵

In the years prior to Clemons the Mississippi Supreme Court had relied on a "reasonable good-faith interpretation of [the] existing precedents" in Zant, Johnson v. Thigpen, Evans v. Thigpen, and Edwards v. Scroggy to affirm death sentences when one of the aggravating circumstances appeared to be invalid. This Court's decision holding Zant could no longer be relied on by a weighing state and by constitutionalizing the function of Mississippi's aggravating circumstances,

¹⁵ Contrary to petitioner's assertion, Stringer is not similarly situated as Parker. The distinction in the two cases is dramatically revealed by the difference in the two capital punishment schemes as is shown in our discussion outlining the operation of the Mississippi capital punishment scheme.

contrary to the clear teaching of Lownefield, created a new rule by limiting the Mississippi Supreme Court's discretion in upholding death sentences for the first time.

C. Exceptions to Teague.

The next step of the inquiry is to determine whether or not the new rule announced in Clemons falls within one of the two exceptions to the non-retroactivity rule of Teague. The first exception as announced in Teague was that the new rule will be retroactively applied "if it places 'certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe.'" 489 U.S. at 311. This was later expanded in Penry v. Lynaugh, 492 U.S. 302 (1989), to cover the sentence phase of death penalty cases by holding that a new rule would be retroactively applied if it prohibited "a certain category of punish-

ment for a class of defendants because of their status or offense." 109 S.Ct. at 2953. Clearly, the rules announced in Maynard and Clemons do not "decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons." Thus neither rule falls within the first exception and neither applies to Stringer's case. Saffle, 110 S.Ct. at 1263.

The second exception was well stated by the court of appeals in Smith v. Black and we would quote from that decision to set it out. Judge King stated:

The second exception is for those rare "watershed rules of criminal procedure" which implicate the fundamental fairness and accuracy of the criminal proceeding. See Saffle, U.S. at ___, 110 S.Ct. at 1263; Butler, 110 S.Ct. at 1218. As the en banc court noted in Sawyer v. Butler, 881 F.2d 1273, 1294 (5th Cir.1989) (en banc), aff'd sub nom. Sawyer v. Smith, U.S. ___, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990), this exception is tailored to those rules designed

to redress constitutional violations which "so distort the judicial process as to leave one with the impression that there has been no judicial determination at all, or else skew the actual evidence crucial to the trier of fact's disposition of the case," and does not include procedurally flawed contemplation or review of relevant evidence. As the Supreme Court recently observed in Sawyer v. Smith, "[a]ll of our Eight Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense," but Teague's second exception is limited to "watershed" rules affecting "bedrock procedural elements." U.S. ___, 110 S.Ct. at 2831. The rule on which Smith would rely is not of such exalted stature.

904 F.2d at 986-987.

The new rule created in Maynard and the one created in Clemons, under consideration here, are not "watershed" or "bedrock" rules of criminal procedure. Maynard and Clemons clearly represent decisions relating to "procedurally flawed contemplation or review of relevant evidence." Smith v. Black, 904 F.2d at 986. For

this reason we would submit that Stringer's case does not fall under the second exception announced in Teague.

CONCLUSION

For the above and foregoing reasons the decision of the United States Court of Appeals for the Fifth Circuit affirming the denial of habeas corpus relief as to petitioner's sentence of death in this case should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

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(9)
No. 90-6616

Supreme Court, U.S.

FILED

OCT 4 1991

OFFICE OF THE CLERK

**IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1991**

JAMES R. STRINGER,

Petitioner,

v.

**LEE ROY BLACK, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF
CORRECTIONS, ET AL.,**

Respondents.

**On Writ Of Certiorari to the United States
Court Of Appeals For The Fifth Circuit**

**BRIEF AMICUS CURIAE OF THE STATES OF
TEXAS, ALABAMA, ARIZONA, CALIFORNIA,
INDIANA, KENTUCKY, MISSOURI, MONTANA,
NEVADA, NORTH CAROLINA, OKLAHOMA,
PENNSYLVANIA, VIRGINIA, AND WYOMING IN
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QUESTIONS PRESENTED

- I. Whether the rule of *Maynard v. Cartwright*, 486 U.S. 356 (1988), is a "new rule" that cannot be applied retroactively in collateral review?
- II. Whether *Clemons v. Mississippi*, 494 U.S. ___, 110 S. Ct. 1441 (1990), is a "new rule" that cannot be applied retroactively in collateral review?

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No. 90-6616

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

JAMES R. STRINGER, *Petitioner,*

v.

**LEE ROY BLACK, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF
CORRECTIONS, ET AL.,** *Respondents.*

On Writ Of Certiorari to the United States
Court Of Appeals For The Fifth Circuit

**BRIEF AMICUS CURIAE OF THE STATES OF
TEXAS, ALABAMA, ARIZONA, CALIFORNIA,
INDIANA, KENTUCKY, MISSOURI, MONTANA,
NEVADA, NORTH CAROLINA, OKLAHOMA,
PENNSYLVANIA, VIRGINIA, AND WYOMING IN
SUPPORT OF RESPONDENT**

TO THE HONORABLE JUSTICES OF THE
SUPREME COURT:

NOW COME the States of Texas, Alabama,
Arizona, California, Indiana, Kentucky, Missouri,

Montana, Nevada, North Carolina, Oklahoma, Pennsylvania, Virginia, and Wyoming, by the Attorney General of Texas, and file this Brief *Amicus Curiae* in Support of Respondent, Lee Roy Black, Commissioner, Mississippi Department of Corrections.¹

INTEREST OF AMICI

Amici are States with an interest in the limited application of new constitutional rules in federal habeas review effected by the retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), and in the interests of federalism, comity, and finality from which the retroactivity doctrine derives.

This brief is submitted by *amici* through their respective Attorneys General or Chief State Attorneys in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

Stringer was indicted for and convicted of the capital offense of murder of Nell McWilliams during the course of an attempted robbery of her husband, Ray McWilliams. Stringer had previous business dealings with Ray McWilliams, who was in the business of buying and selling jewelry; McWilliams operated out of his home and kept large amounts of money in a safe. The trial evidence showed that Stringer initiated and orchestrated the offense: he laid detailed plans for the robbery, instructed the four other participants that the McWilliamses had to be killed because they knew him and could identify him, and furnished weapons for the participants. The plan included cutting the throats of Ray and Nell McWilliams, because Stringer was afraid

¹ For clarity, Petitioner will be referred to as "Stringer."

that the sound of gunshots would be heard by a police officer whose house was adjacent to the McWilliams home.

The crime did not go according to plan. Ray and Nell McWilliams were murdered in their home on June 21, 1982, but not by having their throats cut. The plan went awry when Ray McWilliams attempted to disarm Stringer, and Stringer's gun discharged during the ensuing scuffle. Accomplice John Mack Parker then placed his gun to Ray McWilliams' head and fired. Stringer's son and accomplice, James Stringer, put the end of a "riot" gun--the equivalent of a sawed-off shotgun--to the back of Nell McWilliams' head and shot her as she crawled on the floor. *Stringer v. State*, 454 So.2d 468, 471-72 (Miss. 1984).

At the punishment phase of Stringer's trial, the jury returned a sentence of death after finding three aggravating circumstances: (1) "[t]he Defendant contemplated that life would be taken and/or the capital murder was intentionally committed and that the Defendant was engaged in an attempt to commit robbery; and was committed for pecuniary gain"; (2) "[t]he capital murder was committed for the purpose of avoiding or preventing the detection and lawful arrest of James R. Stringer, the Defendant"; and (3) "[t]he capital murder was especially heinous, atrocious or cruel."

Stringer directly appealed his conviction and sentence to the Mississippi Supreme Court and, concurrently, appealed the trial court's denial of a petition for writ of error coram nobis. The Mississippi Supreme Court affirmed on July 11, 1984, and on August 15, 1984, modified its opinion on denial of rehearing. *Stringer v. State*, 454 So.2d 468 (Miss. 1984). In affirming Stringer's death sentence, the

appellate court concluded that the sentence was not influenced by passion, prejudice, or any other arbitrary factor. *Id.* at 478.

Stringer's conviction became final on February 19, 1985, when this Court denied his petition for writ of certiorari. *Stringer v. Mississippi*, 469 U.S. 1230 (1985).

Following the denial of state collateral relief, *Stringer v. State*, 485 So.2d 274 (Miss.), *cert. denied*, 479 U.S. 922 (1986), Stringer initiated a federal habeas action in the United States District Court for the Southern District of Mississippi. The district court conducted an evidentiary hearing and on November 20, 1987, denied habeas corpus relief. *Stringer v. Scroggy*, 675 F.Supp. 356 (S.D. Miss. 1987). On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the denial of habeas relief on December 22, 1988, *Stringer v. Jackson*, 862 F.2d 1108 (5th Cir. 1988), and denied rehearing on January 20, 1989.

Stringer petitioned for a writ of certiorari. On April 16, 1990, the Court granted certiorari, vacated the judgment, and remanded to the Fifth Circuit for further consideration in light of *Clemons v. Mississippi*, 494 U.S. ___, 110 S. Ct. 1441 (1990). The court of appeals issued its opinion on remand, holding that *Clemons* was a new rule that could not be retroactively applied on federal habeas review. *Stringer v. Black*, 909 F.2d 111 (5th Cir. 1990). This proceeding followed.

SUMMARY OF ARGUMENT

If *Maynard v. Cartwright*, 486 U.S. 356 (1988), or *Clemons v. Mississippi* actually stands for the proposition underlying Stringer's argument, that a death sentence violates the Eighth Amendment if an aggravating circumstance found by the jury is

invalidated for a reason other than constitutionally inadequate narrowing or injection of constitutionally impermissible sentencing concerns into the individualized determination of sentence, then either or both decisions represent "new rules" that cannot be applied retroactively on collateral review. *Zant v. Stephens*, 462 U.S. 862 (1983) and *Barclay v. Florida*, 463 U.S. 973 (1983), established that a valid death sentence results from a procedure that both genuinely narrows the class of persons eligible for the death penalty and provides for an individualized sentencing determination based on the defendant's character and the circumstances of the crime. Assuming *arguendo* that Mississippi's "especially heinous, atrocious or cruel" aggravating circumstance is impermissibly vague, under *Stephens* and *Barclay*, the jury's finding of this factor does not implicate the Constitution if the class of persons eligible for the death sentence is otherwise genuinely narrowed at the guilt-innocence phase by the definition of capital murder or at the punishment phase by a constitutionally adequate circumstance. If the Court's reversal of the sentence in *Cartwright* is based on a rejection of this analysis rather than deference to Cartwright's possible right under state law to have his sentence modified to life, then *Cartwright* established a "new rule." Alternatively, if *Cartwright* did not reject the "harmless error" analysis of *Stephens* and *Barclay*, then, to the extent that the Court repudiated this analysis in *Clemons*, that decision sets forth a "new rule."

Moreover, the standards of appellate review set forth in *Clemons* were not dictated by *Lockett v. Ohio*, 438 U.S. 536 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *Lockett* and *Eddings* were concerned with *what* mitigating evidence a jury must be permitted to consider not with *how* it should be considered. Mississippi's application of its automatic

affirmance rule to disregard the finding of the "especially heinous" circumstance, does not affect *what* mitigating evidence is considered in making the individualized assessment of sentence but *how* it is to be given effect--a concern that is not even within the logical compass of *Lockett* and *Eddings*.

ARGUMENT

With two limited exceptions, "new" rules of federal constitutional law cannot be applied on collateral review of a conviction that was final before the rule was announced. *Butler v. McKellar*, 494 U.S. ___, ___, 110 S. Ct. 1212, 1216 (1990); *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989); *Teague v. Lane*, 489 U.S. at 310. A decision announces a new rule for retroactivity purposes if it "'breaks new ground,' 'imposes a new obligation on the States or Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.'" *Saffle v. Parks*, 494 U.S. ___, ___, 110 S. Ct. 1257, 1260 (1990), quoting *Teague v. Lane*, 489 U.S. at 301 (emphasis in original).

Non-retroactivity of new constitutional rules on collateral review reflects the nature, function, and scope of the writ and accommodates interests of comity and finality. *Teague v. Lane*, 489 U.S. at 305-08, quoting *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J., concurring in judgment in part and dissenting in part) ("The relevant frame of reference . . . is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ is available"); see also *Butler v. McKellar*, 494 U.S. at ___, 110 S. Ct. at 1216-17; *Saffle v. Parks*, 494 U.S. at ___, 110 S. Ct. at 1260. Thus, the question whether a decision announces a new rule is answered by reference to the purposes for which the habeas writ

is made available, the pre-eminent purpose being to ensure that state criminal proceedings are conducted in accordance with then-existing constitutional requirements. *Saffle v. Parks*, 494 U.S. at ___, 110 S. Ct. at 1260, citing *Butler v. McKellar*, 494 U.S. ___, 110 S. Ct. at 1216-17. Accordingly, to provide the incentive for trial and appellate judges to conduct their proceedings in accordance with established constitutional principles, habeas courts need only apply the constitutional standards that prevailed at the time of the original proceedings. *Teague v. Lane*, 489 U.S. at 306.

The principle that a new constitutional rule will not be applied on collateral review of convictions that became final before the rule was announced also reflects the State's interest in finality. "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague v. Lane*, 489 U.S. at 309.

For the purposes of the *Teague* retroactivity analysis, a rule sought by a petitioner is dictated by prior precedent if, at the time the petitioner's conviction became final, a state court would have felt *compelled* by existing precedent to conclude that the rule sought by petitioner was required by the Constitution. *Saffle v. Parks*, 494 U.S. at ___, 110 S. Ct. at 1260. The fact that the rule sought may be characterized as being informed by or within the logical compass of previously existing precedent, or even controlled or governed by prior decisions, does not mean that it was dictated or compelled by the pre-existing law and, thus, does not resolve the "new rule" inquiry. *Sawyer v. Smith*, 497 U.S. ___, ___, 110 S. Ct. 2822, 2828 (1990); *Butler v. McKellar*, 494 U.S. at ___, 110 S. Ct. at 1217. The "new rule" principle ensures

that "reasonable, good faith interpretations of existing precedents made by state courts" are validated, even though the interpretations ultimately conflict with later Supreme Court decisions. *Butler v. McKellar*, 494 U.S. at ___, 110 S. Ct. at 1217. Thus, habeas review is foreclosed not only when petitioner's claim clearly breaks new ground or imposes new obligations on state or federal courts, but also when the outcome of a claim is susceptible to debate among reasonable jurists, when the reasoning underlying existing precedent supports a different conclusion, or when existing precedent "indicates" that a different conclusion might be reached. *Id.* at ___, 110 S. Ct. at 1217-18.

Maynard v. Cartwright and *Clemons v. Mississippi* were not dictated by previously existing precedent. Indeed, the reasoning employed in both *Stephens* and *Barclay* reasonably supports conclusions that differ from those reached in *Cartwright* and *Clemons*, including the conclusion that, under the circumstances presented in *Clemons* and in this case, application of Mississippi's automatic affirmance rule is constitutional.

I.

THE COURT'S DECISION IN MAYNARD V. CARTWRIGHT WAS NOT DICTATED BY EXISTING PRECEDENT.

At the time *Cartwright* was announced, it had been established that, in order for a death sentence to be valid, it must result from a sentencing procedure that provides for both (1) a genuine narrowing of the class of persons eligible for the death penalty in a manner that reasonably justifies the imposition of the death sentence, see *Zant v. Stephens*, 462 U.S. at 877;

Lowenfield v. Phelps, 484 U.S. 231, 244 (1988), and (2) an individualized determination that death is the appropriate sentence in the particular case. See *Barclay v. Florida*, 463 U.S. at 958, quoting *Zant v. Stephens*, 462 U.S. at 879 ("what is important . . . is the individualized determination on the basis of the character of the individual and the circumstances of the crime"). Further, *Stephens* and *Barclay* established that the invalidation of a statutory aggravating circumstance upon which a death sentence rests does not necessarily render the sentence unconstitutional. Rather, the constitutionality of the resulting sentence depends on two interrelated factors: "the function of the jury's finding of an aggravating circumstance under [the state's] capital sentencing statute, and [] the reasons that the aggravating circumstance at issue . . . was found to be invalid." *Zant v. Stephens*, 462 U.S. at 863; *Barclay v. Florida*, 463 U.S. at 951

Cartwright marks a significant departure from prior precedent if it actually stands for the proposition underlying Stringer's argument, that a death sentence can violate the Eighth Amendment if an aggravating factor found by the sentencer is invalidated for a reason other than constitutionally inadequate narrowing or injection into the individualized sentencing determination of constitutionally impermissible considerations. No previously existing precedent supports, much less dictates, this interpretation of *Cartwright*. *Amici* ask the Court to reaffirm its prior holdings and clarify that the Eighth Amendment is not implicated by the invalidation of an aggravating factor unless the reason for the invalidation is itself constitutional in nature--a complete absence of narrowing or the injection of unconstitutional factors into the sentencing process.

A. The constitutionally required narrowing function is accomplished by the finding of one aggravating circumstance.

The death sentence invalidated in *Godfrey v. Georgia*, 446 U.S. 420 (1980), was based on the jury's finding of a single aggravating factor--that the offense was outrageously or wantonly vile, horrible or inhuman. The Court held that, without a narrowing construction, the aggravating factor found by the jury did not satisfy the requirement that states "define crimes for which death may be imposed in a way that obviates 'standardless [sentencing] discretion.'" *Id.* at 428. The Court also noted that a person of ordinary sensibility could characterize almost every murder as "outrageously or wantonly vile, horrible or inhuman." *Id.* at 428-29. Because the factor could be fairly found to characterize most murders, it did not perform the function required by the Eighth Amendment of narrowing the class of people eligible for the death penalty. Consequently, *Godfrey's* sentence was held unconstitutional.

In *Stephens*, however, the Court held that the Georgia Supreme Court's invalidation of one of three statutory aggravating circumstances did not implicate the Eighth Amendment. The state court's reason for invalidating the factor was analogous to the rationale for this Court's holding in *Godfrey*--the factor did not provide a principled basis for distinguishing cases in which the death penalty may be imposed from cases in which it may not be imposed. *Zant v. Stephens*, 462 U.S. at 878 & n.16. Given the state court's holding, the Court held that the constitutionality of *Stephens'* death sentence depended "on the function of the jury's finding of an aggravating circumstance under Georgia's capital sentencing statute, and on the reasons that the aggra-

vating circumstance at issue in this particular case was found to be invalid." *Zant v. Stephens*, 462 U.S. at 863.

Under Georgia's capital sentencing scheme "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." *Id.* at 874. Although the challenged factor might not have been sufficient *by itself* to narrow the class of death-eligible defendants, this Court nonetheless held that *Stephens'* death sentence could stand, because the narrowing function was properly accomplished by the two remaining valid aggravating circumstances. Apart from narrowing, the challenged factor did not violate the Constitution because it merely authorized the jury to consider constitutionally permissible factors that were properly before it. *Id.* at 885. The Court cautioned, however, that it did "not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose a death penalty." *Id.* at 890.

The Court's possible limitation of the holding of *Stephens* cannot be interpreted to compel the conclusion reached in *Cartwright*, particularly when *Stephens* is read in conjunction with *Barclay v. Florida*. In *Barclay*, decided less than a month after *Stephens*, the Court addressed the effect of the jury's finding of a non-statutory aggravating circumstance on the validity of a sentencing proceeding in which the jury was required to weigh statutory aggravating circumstances against mitigating circumstances but was not permitted to con-

sider non-statutory aggravating circumstances.² The Court noted that federal review of aggravating circumstances employed by a state to narrow the class of people eligible for the death penalty is limited to whether the circumstances "are so unprincipled or arbitrary as to somehow violate the United States Constitution." *Barclay v. Florida*, 463 U.S. at 947. The Court concluded that the trial court's determination that the defendant's criminal record constituted a non-statutory aggravating circumstance presented an issue of state law that did not implicate the adequacy of the constitutionally required narrowing, because it is constitutionally permissible for a state to make a defendant's criminal record an aggravating circumstance. *Barclay v. Florida*, 463 U.S. at 951 n.8.

The decisions preceding *Cartwright* do not support, much less compel, the conclusion that a jury's

² As with the impermissibly vague aggravating circumstance in *Stephens*, whether the finding of a non-statutory aggravating circumstance required vacating the sentence depended upon the function of the aggravating circumstance under Florida law and on the reason why the circumstance was invalid. *Barclay v. Florida*, 463 U.S. at 951. The Court summarized the relevant aspects of Florida state law as follows:

[T]he Florida statute, like the Georgia statute at issue in *Zant v. Stephens*, ... requires the sentencer to find at least one valid statutory aggravating circumstance before the death penalty may even be considered, and permits the trial court to admit any evidence that may be relevant to the proper sentence. Unlike the Georgia statute, however, Florida law requires the sentencer to balance statutory aggravating circumstances against all mitigating circumstances and does not permit non-statutory aggravating circumstances to enter into this weighing process.

Barclay v. Florida, 463 U.S. at 954.

finding of a valid aggravating circumstance may be rendered insufficient to satisfy the narrowing requirement if the jury also found an invalid aggravating circumstance. See *Lowenfield v. Phelps*, 484 U.S. at 246 ("[t]he fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition [to the narrowing accomplished at the guilt-innocence phase] is not part of the constitutionally required narrowing process, and so the fact that the aggravating circumstances duplicated one of the elements of the crime does not make this sentence constitutionally infirm"). Moreover, it was by no means evident that the constitutional validity of the narrowing could be undermined by state procedures, or the lack thereof, for saving a death sentence when one of two or more aggravating circumstances is invalidated. Under both *Stephens* and *Barclay*, as long as one valid aggravating circumstance exists, it should make no difference to the adequacy of the narrowing whether an additional factor was invalidated as a matter of state or federal law. Because, as set forth below, the aggravating circumstance at issue in *Cartwright* and in this case injected no constitutionally impermissible concerns into the jury's sentencing considerations, the invalidation of a death sentence based on the jury's finding of that circumstance constitutes an unprecedented extension of Eighth Amendment protections that was not dictated by existing precedent.

B. *Barclay* and *Stephens* support the conclusion that, if the constitutionally required narrowing has been accomplished by a valid aggravating circumstance, the Eighth Amendment is not violated by the jury's consideration of non-statutory aggravating circumstances that encompass aspects of the defendant's character or background or the circumstances of the offense.

Under the reasoning of *Stephens* and *Barclay*, the Eighth Amendment is not violated by the jury's consideration, in making the individualized sentencing determination, of the nature of the offense via the "especially heinous, atrocious or cruel" circumstance. "Once the jury finds that the defendant falls within the legislatively defined category of people eligible for the death penalty, . . . the jury is free to consider a myriad of factors to determine whether death is the appropriate punishment." *Barclay v. Florida*, 463 U.S. at 950, 966-67, citing *California v. Ramos*, 463 U.S. 992, 1008 (1983). "[T]he Constitution does not require the jury to ignore other possible [non-statutory] aggravating factors in the process of selecting, from among that class [of persons eligible for the death penalty], those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. at 878; *Barclay v. Florida*, 463 U.S. at 957 (there is no constitutional defect in sentence based on both statutory and non-statutory aggravating circumstances).

When a "heinousness"-type aggravating factor is invalidated for a reason other than inadequate narrowing of the class of death-eligible persons, the circumstances of the crime remain as a constitutionally permissible non-statutory aggravating factor. Regardless whether sentencing discretion is channelled through weighing of aggravation and mitigation, consideration of a non-statutory aggravating factor can undermine the constitutionality of the individual sentencing determination only if it injects constitutionally prohibited concerns into the jury's deliberations.³ In *Barclay*, the Court was called upon to address the issue that it expressly left open in *Stephens*, the constitutional significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the sentencer is instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose a death penalty. See *Zant v. Stephens*, 462 U.S. at 890. The Court held that the trial judge's consideration of *Barclay*'s criminal record as a non-statutory "aggravating circumstance did not so infect[] the balancing process that it [was] constitutionally impermissible for the Florida Supreme Court to let the sentence stand," precisely because

³ Numerous courts have reasonably interpreted *Barclay* and *Zant* to mean that it is constitutionally permissible for the sentencer to consider information not directly relevant to statutory aggravating and mitigating circumstances, so long as the evidence is relevant to the defendant's character or to the circumstances of the offense. E.g., *People v. Rodriguez*, 794 P.2d 965, 986 (Colo. 1990); *State v. Wille*, 559 So.2d 1321, 1336 (La. 1990); *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359, 374 (1990); *State v. Rose*, 112 N.J. 454, 548 A.2d 1058, 1085 n.11 (1988); *Robins v. State*, 798 P.2d 558, 567 (Nev. 1990); *State v. Gardner*, 789 P.2d 273, 285 (Utah 1989); *Lesko v. Owens*, 881 F.2d 44, 59 (3rd Cir. 1989); *Harris v. Pulley*, 885 F.2d 1354, 1381 (9th Cir. 1988) (as amended on denial of rehearing and rehearing *en banc*); *Coleman v. Saffle*, 852 F.2d 1377, 1390 (10th Cir. 1989).

Barclay's criminal record was an aspect of his background that was properly before the trial judge and nothing in the United States Constitution prohibited the trial court from considering Barclay's criminal record. *Barclay v. Florida*, 463 U.S. at 956-57.

Significantly, Barclay relied on *Godfrey* to challenge two other aggravating circumstances as impermissibly vague: (1) that in committing the murder, he "knowingly created a great risk to many persons," and (2) that the murder was committed to "hinder the lawful exercise of any governmental function or the enforcement of the laws." *Barclay v. Florida*, 463 U.S. at 947, 968-69. While the plurality dismissed these challenges with the conclusion that "[i]t was not irrational or arbitrary to apply these aggravating circumstances to the facts of this case", *id.* at 947, the concurrence's rejection was more instructive.

This evidence was properly before the advisory jury because it was admissible at the guilt phase of the proceeding. Thus, whether or not these particular aggravating circumstances have been narrowly defined by the Florida Supreme Court, this case--like *Zant v. Stephens*--involves challenged findings of "statutory aggravating circumstance[s] ... whose terms plausibly described aspects of the defendant's background that were properly before the jury and whose accuracy was unchallenged.

Barclay v. Florida, 463 U.S. at 969 (concurring opinion), citing *Zant v. Stephens*, 462 U.S. at 887.

C. **Regardless whether *Godfrey* "controlled" the disposition of *Cartwright*, it did not dictate the conclusion that the aggravating factor was unconstitutionally applied in *Cartwright's* case or that his death sentence violated the Eighth Amendment.**

In *Maynard v. Cartwright*, 486 U.S. at 363, the Court approved the court of appeals' holding that *Godfrey* controlled resolution of a challenge to Oklahoma's "especially heinous, atrocious or cruel" aggravating factor. This statement is not dispositive of the retroactivity question presented in this case and cannot be interpreted to mean that *Godfrey* dictated the conclusion that the challenged aggravating circumstance was impermissibly vague. The Court had on several occasions been presented with the opportunity to apply the reasoning of *Godfrey* in reviewing the "especially heinous, atrocious or cruel" factor and had declined to do so. For example, in *Barclay*, without addressing whether the "especially heinous, atrocious or cruel" circumstance was sufficiently specific and unambiguous to accomplish the narrowing required by the Eighth Amendment, the Court concluded that the finding was not "so unprincipled or arbitrary as to somehow violate the United States Constitution." *Barclay v. Florida*, 463 U.S. at 947. The Court approved the finding of the circumstance despite the fact that the judge tailored his understanding of this circumstance to the facts of the case and took into account the racial motive for the murder committed by Barclay, which he compared to his experiences in the Army in World War II, when he saw Nazi concentration camps and their victims. *Barclay v. Florida*, 463 U.S. at 949-50. *Godfrey* was distinguished

on the facts of the crime. *Id.* at 947 n.5; but see *Eddings v. Oklahoma*, 455 U.S. at 109 n.4 (expressing doubt that finding that murder of a police officer in performance of duties is "heinous, atrocious, or cruel" conforms to degree of certainty required by *Godfrey*).

Moreover, *Godfrey* did not dictate the conclusion that Cartwright's death sentence was unconstitutional under the Eighth Amendment. In *Cartwright*, the Court was presented with an issue not raised by the facts in *Godfrey*, specifically whether a death sentence based on a jury's finding of two aggravating circumstances must be reversed when, although one aggravating circumstance is subsequently determined to be unconstitutionally vague, another is unchallenged and sufficient to place the defendant within the class of people eligible for the death penalty. See *Barclay v. Florida*, 463 U.S. at 947 n.5, 956 (*Godfrey* distinguished on the basis that in *Godfrey* the jury found only one, impermissibly vague, aggravating circumstance). The *Cartwright* Court's apparent resolution of that issue represents a divergence from the reasoning of *Stephens* and *Barclay* that the Eighth Amendment is not implicated by an invalid aggravating factor if the constitutionally required narrowing of the class of people eligible for the death penalty is otherwise accomplished by a valid aggravating factor and if the individualized sentencing determination is based on constitutionally permissible information that is properly before the jury. *Barclay v. Florida*, 463 U.S. at 956-57; *Zant v. Stephens*, 462 U.S. at 887; see also *California v. Ramos*, 463 U.S. at 1008 (1983). By extending Eighth Amendment protections beyond the heretofore mandated narrowing and individualized determination of sentence, the Court clearly announced a new rule. Thus, the statement in *Cartwright* that *Godfrey* controlled the resolution of the challenge to Oklahoma's "especially heinous, atrocious

or cruel" aggravating circumstance, does not signify that *Godfrey* dictated the ultimate disposition of Cartwright's challenge.

II.

NO SUPREME COURT PRECEDENT COMPELLED THE DECISION IN *CLEMONS V. MISSISSIPPI*.

In *Clemons*, the Court first set forth the permissible scope and standards of appellate review that a state could employ after an aggravating circumstance found and considered by the sentencer in making the individualized sentencing determination has been invalidated. Following *Clemons*, an appellate court may either (1) reweigh the remaining evidence or (2) conduct a harmless error analysis by determining beyond a reasonable doubt whether the sentence would have been the same if there had been no "especially heinous" instruction or if that circumstance had been properly limited in scope. *Clemons v. Mississippi*, 494 U.S. at ___, 110 S. Ct. at 1449-50.

The *Clemons* Court rejected Mississippi's application of its automatic affirmance rule, under which a death sentence would be sustained if, following the invalidation of an aggravating circumstance, there nonetheless remained one or more valid aggravating circumstances. *Clemons v. Mississippi*, 494 U.S. ___, 110 S. Ct. at 1450, see also *Parker v. Dugger*, ___, 111 S. Ct. 731, 739 (1991). The standards of appellate review set forth in *Clemons* and the rejection of Mississippi's automatic affirmance rule under the facts of *Clemons* cannot reasonably be characterized as

having been foreshadowed, much less dictated, by existing precedent.⁴

The Court further diverged from the reasoning of *Barclay* and *Stephens* in rejecting Mississippi's application of its automatic affirmance rule under the facts presented by *Clemons* in which the only considerations injected into the jury's sentencing determination by the invalid aggravating circumstance were the facts and nature of the offense. As set forth *supra*, *Barclay* and *Stephens* reasonably support the conclusion that the constitutionality of the individualized sentencing determination is not undermined by the jury's consideration via an invalid aggravating factor of evidence relating to the defendant's character or background or the circumstances of the offense, if the constitutionally required narrowing is accomplished by a valid aggravating circumstance or by the definition of the capital offense.

More recently, in *Payne v. Tennessee*, ___ U.S. ___, 111 S. Ct. 2597 (1991), the Court reaffirmed the appropriateness of sentencer consideration of precisely the type of evidence that in *Clemons* was found to require resentencing. At issue in *Payne* was the appropriateness of jury consideration of "victim impact evidence" and argument relating to that evidence. The Court concluded "the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment." *Id.* at ___, 111 S. Ct. at 2605. "[I]t was never held or even suggested in any of our cases preceding *Booth* [*v. Maryland*, 482 U.S. 496 (1987)] that the defendant, entitled as he was to individual consideration, was to re-

⁴ There is nothing in the Court's references to appellate review in *Stephens*, *Barclay*, or *Cartwright* that foreshadowed the rule of *Clemons*.

ceive that consideration wholly apart from the crime which he had committed." *Id.* at ___, 111 S. Ct. at 2605. The conclusion reached in *Clemons*, 494 U.S. at ___, 110 S. Ct. at 1451, that a finding of harmless error was virtually foreclosed by the state's emphasis in closing argument on the "especially heinous" circumstance is, thus, inconsistent with *Barclay* and *Payne*.

No precedent existing at the time of the *Clemons* decision compelled the conclusion that the individualized sentencing determination is rendered constitutionally infirm merely because the circumstances of the offense are characterized as "especially heinous, atrocious or cruel." To the contrary, the Court had on two prior occasions rejected the argument that an individualized sentencing determination was impermissibly skewed merely by the classification of otherwise valid sentencing concerns as an aggravating factor. *Barclay v. Florida*, 463 U.S. at 956; *see also Zant v. Stephens*, 462 U.S. at 889 (mere fact that some of the aggravating circumstances were improperly labeled "statutory" had an inconsequential impact on the jury's decision regarding the death penalty).

Further, prior precedent did not dictate the conclusion in *Clemons* that the concerns of *Lockett v. Ohio* and *Eddings v. Oklahoma* were implicated by Mississippi's application of an automatic affirmance rule because the rule deprived defendants of the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances. The holding of *Lockett* and *Eddings* "that the State cannot bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial" relates to *what* evidence a jury must be permitted to consider not to *how* it must consider the evidence. *Saffle v. Parks*, 494 U.S.

at ___, 110 S. Ct. at 1261. Under Mississippi's capital sentencing proceeding, a jury weighs mitigating evidence against statutory aggravating factors found beyond a reasonable doubt. Despite the Court's reliance on *Lockett* and *Eddings*, the automatic affirmance rule does not affect *what* mitigating evidence is considered. Rather, by disregarding an invalid aggravating circumstance, the rule at most alters *how* the evidence is to be given effect. The rule of *Lockett* and *Eddings*, which is not concerned with *how* evidence is to be given effect, therefore cannot be construed as dictating the rule of *Clemons*.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the court below be affirmed.

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